

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

MONOGRAM COMFORT FOODS, LLC,

and

Case 25-CA-31704 (Amended)

**UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 700.**

*Derek A. Johnson, Esq. (NLRB Region 25),
for the General Counsel*

*Howard S. Linzy, Esq. (The Kullman Firm),
of New Orleans, Louisiana, for the Respondent*

*Alexander G. Barney, Esq. (The Karmel Law Firm),
of Chicago, Illinois, for the Charging Party*

DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves an employer that withdrew recognition from its employees' union based on an employee petition seeking removal of the union. The petition contained the signatures of a (bare) majority of the unit employees employed at the time. The employer thanked its employees in meetings called to announce the petition, repeatedly announced it had withdrawn recognition from the union, but pledged to abide by the extant collective-bargaining agreement until it expired in two and a half months.

The government alleges that the withdrawal of recognition and related conduct by the employer was unlawful under the National Labor Relations Act. The government alleges that the petition was tainted by supervisory involvement, and thus, the employer could not demonstrate a valid lack of majority support for union representation based on the petition. In any event, the government contends that the employer relied upon the petition to withdraw recognition 2 1/2 months before the expiration of the labor agreement, rendering its unilateral withdrawal of recognition unlawful. Further, the government alleges that changes in the employer's dealings with the union attendant to the withdrawal of recognition, constituted unlawful changes in the employment terms and conditions. The government alleges that a delay in providing the union requested information was unlawful. Further, the government alleges a variety of unlawful threats, solicitations, and interrogations of employees, both as part of the petition process and directed towards employees in the months after the withdrawal of recognition. Finally, the government alleges that in an interview with an employee witness in preparation for its defense of the unfair labor practice charges in this case, the employer ran afoul of Board precedent.

The employer denies all wrongdoing. However as discussed herein, my consideration of the record evidence, observation of witnesses at trial, and review of precedent lead me to conclude that the employer has violated the National Labor Relations Act as described below.

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STATEMENT OF THE CASE

On December 9, 2010, the United Food and Commercial Workers International Union, Local 700 (Union or Local 700) filed an unfair labor practice charge against Monogram Comfort Foods, LLC (Employer or Monogram), docketed by Region 25 of the National Labor Relations Board (Board) as Case 25-CA-31704. The Union filed amended charges on February 16 and 25 and April 7, 2011.

On May 11, 2011, based on an investigation into the charge filed by the Union, the Acting General Counsel (General Counsel), by the Regional Director for Region 25, issued a complaint and notice of hearing against Monogram alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (Act). Monogram filed an answer denying all violations of the Act.

A four-day trial in this case was conducted June 28-July 1, 2011, in Muncie, Indiana. Counsel for the General Counsel, the Respondent, and the Union filed briefs in support of their positions by August 10, 2011. On the entire record, I make the following findings, conclusions of law, and recommended remedy and order.¹

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JURISDICTION

The complaint alleges, the Respondent admits, and I find that the Respondent is a corporation with an office and place of business in Muncie, Indiana, where it engages in the business of food processing. The complaint further alleges, the Respondent admits, and I find that during the 12-month period preceding issuance of the complaint, the Respondent in conducting its business operation in Muncie sold and shipped from its Indiana facilities goods valued in excess of \$50,000 directly to points outside the State of Indiana. The complaint further alleges, the Respondent admits, and I find that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is also alleged, admitted, and found that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

¹Counsel for the General Counsel filed a post-trial motion to correct the transcript. His motion is unopposed and granted. Joint Exhibits 1, 2, 3, and 4 (composed of 4(a) and 4(b)) are contained in the joint exhibits file, however, the transcript's index of exhibits at page 5 of the transcript indicates they were not offered into evidence. They were. The offer and receipt of "all" the joint exhibits referred to in the transcript (Tr. 18) was to Joint Exhibits 1-6. Similarly, General Counsel's Exhibits 11 and 12 are contained in the relevant exhibit file. They were offered into evidence without objection (Tr. 55). However, it appears from the transcript that I was diverted and neglected to receive the offer. I do so now. Accordingly, the transcript is corrected as follows: at page 5, lines 6, 8, and 10, "(not offered)" is changed to "18." At page 4, lines 30 and 32, "(not offered)" is changed to "55."

At trial, counsel for the General Counsel orally moved to amend the complaint to add an allegation that the Respondent interviewed an employee in preparation for defense of these unfair labor practice charges without providing the safeguards required by the Board in *Johnnie's Poultry, Co.*, 146 NLRB 770 (1964). This matter is discussed at length herein.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

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1. Background facts

Monogram manufactures corn dogs and pork fritters at its Muncie, Indiana facility. Monogram assumed operation of the facility from the predecessor employer, Al Pete Meats Inc., in approximately May 2009.

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Local 700 represents a bargaining unit of the employees. When Monogram assumed the operation it recognized the Union and assumed the existing collective-bargaining agreement between Al Pete Meats and the Union. This agreement was effective by its terms February 16, 2008, and was slated for termination no earlier than February 12, 2011.²

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The plant manager and top Monogram official at the Muncie, Indiana facility is Greg Staley. The chief departments of the plant are fry room, the fritter room, the pack room, and shipping, along with quality assurance.

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2. The petition to remove the Union

In November and early December 2010, a "petition to remove union as representative" circulated within the plant. The petition (included in the record as Jt. Exh. 5) stated:

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To be filed with the appropriate National Labor Relations Board Regional Office

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PETITION TO REMOVE UNION AS REPRESENTATIVE

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The undersigned employees of Monogram Comfort Foods (employer name) do not want to be represented by UFCW 700 (union name), hereafter referred to as "union."

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Should the undersigned employees constitute 30% or more, but less than 50%, of the bargain unit represented by the union, the undersigned employees hereby petition the National Labor Relations Board to hold a decertification election to determine whether the majority of employees also no longer wish to be represented by the union.

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In addition, should the undersigned employees constitute 50% or more of the bargaining unit represented by the union, the undersigned employees

²The precise contours of the bargaining unit are not established in the record. The labor agreement refers to "those as certified by the National Labor Relations Board on November 9, 1968, which includes production employees." The testimony suggests that the bargaining unit covered, at least the production employees, including "line leaders," and excluding supervisors and managerial employees.

hereby request that our employer immediately withdraw recognition from the union, as it does not enjoy the support of a majority of employees in the bargaining unit.

5 On the petition there was space below the text for employees to print and sign their names and to indicate the date. Twelve such sheets, some signed by more employees than others, were submitted as part of the record in this case.

10 A total of 24 bargaining unit employees (and about 15 nonbargaining unit employees) signed the petition. As of December 1, 2010, there were 46 bargaining unit employees listed on the payroll register. In addition, one employee, Joshua Vance, had been discharged in November and at the time of the hearing his grievance remained pending.

15 The parties stipulated to the authenticity of the signatures on the petition. Notwithstanding the stipulation, one employee witness, Susana Bonilla, testified that her signature was not authentic, although later in her testimony, when she recalled how she signed the petition from an awkward position, standing, as the petition was held out for her to sign by another employee using a file folder as backing, she determined that it "could be my signature." Given my comparison of the petition's signature to exemplars placed in the record, given that
20 Bonilla recalled signing the petition to remove the Union, given her description of the circumstances of the signing, and given her ultimate conclusion that it could be her signature, I find that it was.

25 Of somewhat more concern was Bonilla's assertion that the petition entered into evidence—Joint Exhibit 5—was not the petition she signed and that the text was different. Another employee witness, Miguel Vazquez, also objected that the petition he signed was not Joint Exhibit 5, although he agreed it was his signature that appeared on Joint Exhibit 5. A third employee, Jeremy Toler, testified in some detail that the petition he was asked to sign differed from Joint Exhibit 5. Toler pointed out the specific paragraphs in Joint Exhibit 5—which he was
30 presented with during the trial—that were not in the petition that he had been asked to sign. I also note the unusual fact that every signature on the petition is dated December 1, 2011. If accurate, it speaks of an impressive display of organization by the putative initiators, none of whom testified.

35 While there was near endemic confusion exhibited by witnesses about the dates that certain events in this case occurred,³ as discussed below, some, like former employee Holly

³Witnesses, including otherwise credible witnesses, provided varying recollections—guesses in many cases—of the date of particular meetings or actions. Their testimony was often in conflict on that score. The confusion was pronounced in this case, but not surprising, or, in my estimation, of much consequence in determining credibility. "Dates, and even sequence, are notoriously the subject of testimonial confusion without substantially affecting credibility determinations relating to disputed conversations." *L.D. Brinkman Southeast*, 261 NLRB 204, 209 fn. 5 (1982) (citations omitted); *Hearst Corp.*, 281 NLRB 764, 779 (1986) ("obvious inaccuracy of dates provided for certain events, such as [witness's] account that he had been interrogated whether he had signed an anti-union petition . . . on March 19, appears to have been no more 'than a 'confusion as to details.'" *NLRB v. Longshoremen, Local 10*, 283 F.2d 558, 562–563 (9th Cir. 1960)), *enfd. mem.* 837 F.2d 1088 (5th Cir. 1988). The dates of various meetings, encounters, and other events set forth herein reflect my view of the preponderance of plausible and credible evidence. But there was little agreement between witnesses as to the precise date of many events.

Craig, testified credibly about signing and seeing others signing the petition to remove the Union *before* Thanksgiving. Toler placed his discussions about the petition—and the solicitation that he sign it—about a week before the mass employee meetings conducted by Plant Manager Staley to announce receipt of the petition. Those meetings first occurred December 2, 2010.

Employee Michael Collins testified that he heard about the petition in early November from Marvin Williams. Thus, there is significant evidence suggesting that the signatures for the petition were not all garnered on December 1, as indicated on Joint Exhibit 5. However, given my conclusions on other aspects of the case, I need not resolve the doubts I have that every employee signed the petition December 1 as is stated on the petition next to each signature.

Four employees gave testimony suggesting that supervisory employees played a role in the petition drive, including soliciting signatures and/or offering inducements to convince employees to sign the petition. In each instance, the employee's testimony was controverted by the relevant supervisor. One employee, Miguel Vazquez, testified that Supervisor Anthony Morgan was involved in the petition drive. Three employees, Holly Craig, Jeremy Toler, and Kathy Abner, testified that Supervisor Tina Greene participated in the petition drive. I will consider the evidence regarding each of these allegations.

3. Allegations regarding Anthony Morgan

Employee Miguel Vazquez testified that he signed the petition to remove the Union at the behest of (admitted) Supervisor Anthony Morgan. Morgan is the night manager of the plant and direct supervisor of the fry room. According to Vazquez, "When I was working, the supervisor, Anthony, he called me to sign the sheet." According to Vasquez, Morgan did not explain anything to him, and his testimony suggested that Vazquez, who does not read English, did not know what he was signing when he signed the document.⁴

Vasquez also testified that he signed the petition in the presence of "another person, [bargaining unit employee] Jimmy [Cotes], and only that person," and also agreed that "Jimmy was the one who asked you to sign this sheet of paper."

Cotes and Morgan testified. Cotes testified that he presented the petition to Vazquez in the breakroom and asked him to sign it. Cotes testified that Vazquez signed it in the break room, and that no supervisors were present. Morgan testified too. He denied ever talking to Vazquez about the Union and denied seeing or even knowing about the petition to remove the Union until it was announced by Plant Manager Greg Staley in a meeting December 2, after the signatures were affixed.

This case poses some difficult credibility-based questions. This is one. Both Morgan and Cotes were short witnesses. There was not a lot of time to judge their testimony, but what I saw was offered with sureness and directness. Vazquez seemed out of place. He testified through an interpreter, and this should have helped mitigate any language-based difficulties with his testimony. I thought he was nervous and perhaps unhappy to be there. Neither is a problem in and of itself. But his testimony was extremely tentative, vague, and confusing. And at times contradictory. And it would have been even more difficult to follow had I not allowed the General Counsel to repeatedly ask leading questions of this witness. I believe the General Counsel's evidence falls short here. In the face of the credible contradiction by Morgan and

⁴Similarly, Vazquez testified that previously, at a union representative's behest, he signed a dues checkoff authorization card without knowing what he was signing.

Cotes of Vazquez' tentative testimony, I do not credit Vazquez' story of Anthony Morgan's involvement in his card signing.

4. Allegations regarding Tina Greene

Three employees testified to Supervisor Tina Greene's involvement in the petition effort. I consider the testimony of Greene and the three employees below. Thereafter, I consider and resolve the credibility issues raised by the testimony.

A. Holly Craig

Holly Craig worked at Monogram from July 2010, until February 10, 2011, when she quit. She worked in the fry room. Marvin Williams was her line leader in the fry room. Williams reported to supervisor Tina Greene.

Craig testified that she learned of the petition to remove the Union when Williams approached her in November 2010 and asked her to sign it. In her testimony she repeatedly stated that this occurred before Thanksgiving.⁵ According to Craig, Williams approached her last among employees on the line and she saw others signing the petition before she was approached.

Craig refused to sign the petition. According to Craig, after she "told him no, he took it back to the office and Tina [Greene] called me into the office and tried to talk me into just signing the petition." Craig testified that when she told Greene she did not want to sign the petition, Greene told her that the insurance Monogram offered was better than that offered by the Union. Craig told Greene that she had heard people talking about signing the petition and that Craig had heard that people who signed the petition to remove the Union would be fired and Craig told Greene, "I don't want to get fired." Greene told her she wouldn't get fired. During this conversation they were alone, although Williams entered and exited the office at some point, and Greene and Craig stopped talking for the short time he was there.⁶

According to Craig, Greene relented but then followed her out of the office into the boot room and persisted in trying to get Craig to sign the petition:

She said, "I thought you wanted the union out." I was like, "No, I don't want the union out." She finally—basically, to me, it was harassment to get me to sign it. I said alright just to get her off my back because she wouldn't leave me alone about it.

Greene gave her the petition and Craig signed it.

⁵Only once did she say she signed it "either before or after" Thanksgiving. But after being pressed on this point, Craig testified with conviction that it was before Thanksgiving that this occurred. Tr. 125 ("I thought it was before Thanksgiving because that's what happened").

⁶Contrary to the Respondent's claim on brief (R. Br. at 9), Craig did not contradict herself about who was in the office with her during the incident with Greene. She testified that first it was just her and Greene. And then, in the middle of her conversation with Greene, Williams entered the office.

The next day, Craig approached Plant Manager Staley in the cafeteria and told him “that I wanted my name off of it. He said it was too late, that he already sent it to the lawyer’s, or something. I don’t know. He sent it somewhere. I don’t know where he sent it to. He said something about the lawyers.”

Greene and Staley testified. Staley did not deny or even address Craig’s testimony about her request to remove her name from the petition. I credit this uncontradicted assertion by Craig.⁷

Greene denied soliciting Craig to sign the petition. She testified that she followed instructions she received when she became a supervisor eight years ago, that “we could not talk about the union with the employees, but that, if they asked a question, we could answer it.” Greene denied ever having seen the petition to remove the Union, and claimed she heard about it for the first time on the evening of December 1, when her sister—a bargaining unit employee—mentioned it to her (in discussions also in dispute in this case). Greene testified that her only discussion with Craig regarding the Union occurred on December 2, at approximately 9 a.m., during Craig’s first morning break, when Craig briefly—for a matter “of seconds”—appeared in Greene’s office door and asked Greene about the prospects for the guaranteed 32 hours of work promised to employees in the labor agreement. Greene told Craig that in her opinion “[i]t would no longer be there if the union wasn’t there.” Craig then “turned around and went back out.” Greene testified that line leader and bargaining unit employee Marvin Williams, who had presented the petition to many of the employees, was in the office when Craig came by to ask the question.

B. Jeremy Toler

Jeremy Toler began working at Monogram in 2009. He is a line leader in the pack room. Toler testified that he learned about the petition to remove the Union when Tina Greene called him into her office one day around noon “and asked my opinion about being for the union or against the union.” Toler did not recall the date of this event, estimating it to be “six months ago or so,” but more concretely, “maybe a week or so” before the December 2 meeting with employees conducted by Plant Manager Greg Staley regarding the petition to remove the Union.

Only he and Tina were in her office. According to Toler:

Once I got in there, she asked was I for the union or against the union. I told her that I really hadn’t made up my mind at the time. She asked me was I happy with them taking \$28 and some change out of my check every month. I told her, you know, that’s their policy and I give everybody a fair chance. She told me if I

⁷The Respondent contends (R. Br. at 7) that “Craig became so muddled on cross-examination that it was unnecessary to have Staley address” this portion of Craig’s testimony. I did not observe that. On cross-examination the Respondent established only that this event was not referenced in Craig’s pretrial affidavit. That is a point worth making, but it is not, in my estimation a particularly compelling one. Craig said nothing in her direct or cross examination that evinced any confusion about this incident or any lack of conviction that the incident with Staley occurred. I found her credible on this point, and the fact that this significant claim went un rebutted—though the case was litigated with great attention to detail—only adds to the view that the testimony on this point should be credited.

wasn't happy with it that I could just sign the paper and it wouldn't come out of my check anymore. That's when I told her that I wasn't going to sign the paper.

Toler testified that the paper Greene was referring to was "[a] petition to vote the union out" that Greene retrieved from the tray of the copier (or printer) in the office. The copier is attached to a computer in the office, and sits on Anthony Morgan's desk, the supervisor with whom Greene shares the office. Only Greene and Morgan use the computer.

The petition Greene showed Toler was a single page. Toler described the petition Greene had as similar to Joint Exhibit 5, but with less text. There were spaces for signatures, but no signatures. Below is the text of the petition shown to Toler by Greene, based on his testimony, with the differences in text from Joint Exhibit 5 struck:

~~To be filed with the appropriate
National Labor Relations Board Regional Office~~

PETITION TO REMOVE UNION AS REPRESENTATIVE

The undersigned employees of Monogram Comfort Foods (employer name) do not want to be represented by UFCW 700 (union name), hereafter referred to as "union."

~~Should the undersigned employees constitute 30% or more, but less than 50%, of the bargain unit represented by the union, the undersigned employees hereby petition the National Labor Relations Board to hold a decertification election to determine whether the majority of employees also no longer wish to be represented by the union.~~

~~In addition, should the undersigned employees constitute 50% or more of the bargaining unit represented by the union, the undersigned employees hereby request that our employer immediately withdraw recognition from the union, as it does not enjoy the support of a majority of employees in the bargaining unit.~~

After Toler told Greene he was not going to sign the paper, "that was pretty much it. I went back to work."

A couple of days later, at approximately 8:30 or 9:00 a.m., Greene again raised the matter with Toler:

This time, it was pretty much her defending the reason [] why I should sign the paper as far as better wages and more days off as far as like holidays and things like that.

* * * * *

She made a statement like, "Why would you want to pay the union your money when they've done nothing for you to this point?" She went on about how long she'd been there and what she's experienced with the union. Like I said, she made the point that by being company, not union, that our pay would be better and we would—I think it was two extra days, holidays off on the calendar. That's when I told her that I just wasn't going to sign it.

In her testimony, Greene denied discussing the Union with Toler at any time in 2010, denied having had a copy of the petition, denied having asked any employee to withdraw support for the Union, and denied promising any employee that they would receive improved benefits if the Union was removed.

C. Kathy Abner

Kathy Abner has worked at Monogram since 2000. She works in the fritter room. Tina Greene is her immediate supervisor, and her sister.

Abner testified that she first heard about the petition to remove the Union from her sister in "November or December" when Greene called her one evening at home, around 7 or 8 p.m., and "asked me if I knew if there was a petition going around. I said no, and she said she'll talk to me more about it tomorrow." Greene identified the petition as a petition "[t]o vote out the union."

In the morning, Abner reported to work at 6 a.m. She saw Greene who told Abner, "I will call you." Greene called for her between 8 and 9 a.m., and Abner went to Greene's office. Greene asked Abner if she would sign the petition. Abner expressed concerns about things changing because "we always had a union" and Greene told Abner that "nothing was going to change" if there was no union at the plant. Abner told Greene that she "wasn't sure. I would have to think about it." Abner returned to work. At some point that day she told coworker Ronnie Strunk that Greene wanted her to sign the petition, but she was unsure.

Later that day, around 2 p.m., Greene called Abner back to her office and again "asked me if I wanted to sign" the petition. This time, according to Abner, line leader Marvin Williams was in the office. Abner again said that she wasn't sure, and Greene told her "[w]ell, you don't have to because with or without your signature, we have enough." Abner reiterated that she wasn't sure what to do and Greene said, "[i]t's just between me and you," to which Abner replied, "[a]nd him," referring to Williams. Greene said, "Marvin won't say anything if she signs it, right?" Williams said "Oh, no, no. it's just between us." Greene told Abner that she did not have to sign the petition, "It was up to me." The phone rang and Greene said, "that's probably Greg. He's waiting on it. We've got to get it over there for him to send it in." At that point the three left the office. Greene and Williams left the room, with Greene saying she had to take the petition to Staley. Abner declared that she was not going to sign the petition and she left.

Greene testified and told an entirely different story. She testified that she first heard about the petition on the evening of December 1, when she called her sister Kathy Abner at home to tell her that the fritter room was scheduled to operate the next day. According to Greene, Abner asked Greene if she knew about "the petition going around." Greene told her no, and that "I couldn't talk about the union with her, I could only answer any questions that w[ere] asked to me." Greene testified that the next day Abner came, unsolicited, to Greene's fry room office between 11 and 12. She sat down and said she wanted to ask Greene a question. Williams was present. Greene testified that Abner asked her about seniority and "if seniority would matter" if the Union was not there. During the conversation, Ronnie Strunk opened the door and indicated he also wanted to ask a question. He asked about whether the employees would still have the 32-hour guarantee if the union was voted out. Greene told him, in her opinion, no, they would not. Strunk left, and Abner returned to her question about seniority. Greene didn't know the answer so she called Plant Manager Staley and after speaking to him,

told Greene that everything would stay the same. Greene estimated that Abner was in her office for two to three minutes. Williams did not speak during the time Abner was there.

D. Credibility resolutions regarding Toler, Craig, Abner, and Greene

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I found Toler a particularly credible witness based on his demeanor. He testified in a thoughtful direct manner, with assurance, but without embellishment. His testimonial account of his encounters with Greene were offered in a serious and sure way, and with appropriate detail. His manner was convincing to me. I do not believe he made it up. His assertion that Greene picked up a shorter version of the petition off the computer printer sounds very much like she had printed out an early version of the petition.

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Craig was also a good witness, though less precise and sure than Toler. She struck me as disinterested (and at the end, a little uninterested), which comported with the fact that she no longer worked at Monogram, and, to my mind, this added to her credibility: she has no stake in the outcome. Together, Toler and Craig's testimony, and the rough similarity of the conduct they attribute to Greene, had the effect of adding to the weight of their individual testimony. Barring a conspiracy between the current and former employee (and I have no reason to believe and do not believe that) their testimony had the effect of corroborating the likelihood that if Greene would act this way with one, she would act this way with the other. And as discussed below, although more problematic, a third employee, Kathy Abner, also alleged similar conduct by Greene.⁸

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Greene was not a bad witness. I did not find anything suspect in her demeanor that was of obvious concern. She denied ever talking to Toler about the Union, and given his testimony, that is not something I believe. She admitted to only a very limited discussion with Craig. She denied all misconduct and even knowledge of the petition prior to speaking with Abner—according to Greene—the night of December 1. That seems unlikely, given that the petition had, by that time, been signed by numerous bargaining unit and nonbargaining unit employees, some while working. The weight, reasonableness, and compelling nature of Toler and believability of Craig's testimony lead me to credit them over Greene.

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Abner's demeanor was earnest, a little scared, but honest. Greene's testimony was unremarkable. As with her description of events with Craig, she admitted limited contact with Abner about the Union, confined to Abner asking a question about the Union. She testified that she called Staley from her office, with Williams and Abner present, to answer a question that Abner had about adherence to seniority if there was no Union. Staley testified extensively but did not corroborate this, which occurred, by Greene's account, just a couple of hours before Staley called the employees to a mandatory meeting at which he announced his receipt of the petition.

⁸I recognize that a number of witnesses saying things happened do not have to be credited over a single witness who says they did not. But *credibly offered* evidence does add up and adds to the weight of the evidence. Toler and Craig were credible witnesses. The fact that they both testified to distinct but similar incidents with Greene adds to my confidence that they were telling the truth. *Hearst Corp.*, 281 NLRB at 780 ("that so many witnesses testified to similar remarks on separate occasions by Chamberlain is a probative consideration in assessing the reliability of those descriptions").

Consideration of Abner's credibility must take into consideration the pretrial effort by the Respondent to bolster Greene's testimony—and neutralize Abner's. On March 16, 2011, three months before the hearing, after the filing of unfair labor practice charges, but before the issuance of the complaint, Abner was called into Greene's office and asked to sign a statement, prepared by a Monogram official from Memphis identified only as Carl. The statement was titled "sworn statement" and stated:

I, Kathy Abner, am Tina Green[e]'s sister and I am employed at Monogram Comfort Foods, LLC.

After being advised that I could answer questions without fear of reprisal or promise of reward, I reviewed the statement (attached) signed by Tina Green[e], and, to the extent I have personal knowledge, the statement is true and correct.

This statement was signed (albeit not sworn to) by Abner. The statement by Greene allegedly attached (although Abner testified that it did not look the same and she did not seem to have much familiarity with it) was a statement, also prepared by Carl, which recapitulated events as later testified to by Greene.

I do not find this pretrial effort to develop corroboration for and impeachment of testimony yet to be provided persuasive. Indeed, it reeks of a certain aggressive pretrial "advocacy"—not factfinding—that reflects a fear of Abner's uncoerced testimony. Even as impeachment it is suspect. It is an inconsistent prior statement, but one that relies on—indeed, is nothing more than—a conclusory endorsement of another allegedly attached statement with which Abner did not appear familiar, and which she disputed when she viewed it at trial. In other words, it is not, standing alone, her statement. In none of the accounts of this encounter—from Greene, from Abner, or from Peter Chan, a quality manager at Monogram who was involved in witnessing and procuring Abner's signature—was there any explanation or clarification of when, how, or if, Abner saw or considered the Greene statement prior to being ushered into Greene's conference room and confronted with the statement to sign, which she quickly did sign "for Tina." Chan testified that "the only thing I remember is that she seemed hesitant to sign it because she was worried she was going to get in trouble or something like that, but we reassured her that that wasn't the case and I mean she signed it afterwards."

In Chan's testimony, he repeatedly (Tr. 458, 461) referenced telling Abner when she entered Greene's office that this was the statement "we talked about" and that "you had given earlier" but the record does not reveal what these prior conversations involved or when they occurred, or who was involved. At the conclusion of his testimony, I asked Chan about this. He denied saying it. But he did.

What I am left with is a witness who, when called into her supervisor's (and sister's) office, and with two supervisors present, signs a short statement stating she agrees with another statement previously signed by her sister and shown to her, perhaps, for the first time while the supervisors observe. There appears to be an earlier meeting or discussion that one of the supervisors references in his testimony, but denies when asked about it. According to the supervisor, the witness appears "hesitant" to sign but is then "reassured" and then signs. That is what happened in the supervisor's office.

However in the light of day, with the protection of courtroom procedures, and under oath, the witness tells a very different story, and even disputes whether the statement provided in court was the one attached to her own prior statement. Under these circumstances, I think the

truth is to be found in the witness' trial testimony, not her conclusory agreement to a supervisor's story garnered in the supervisor's office.⁹

For the reasons stated, I credit the trial testimony of Toler, Craig, and Abner, regarding their encounters with Greene regarding the employee petition. I discredit Greene to the extent her testimony conflicted with these employees' testimony.

5. the withdrawal of recognition of the Union; meetings with employees; and the refusal to negotiate a successor agreement

On December 1, 2010, the Union wrote to Monogram notifying it of an intent to renegotiate the labor agreement, due to expire February 12, 2011. The Union's letter asked Monogram to contact the Union to arrange for dates to commence negotiations.

On December 2, 2010, Staley sent an email to Union representatives Mike Merrell and Jeff Thompson, with an attached letter from Staley to Thompson stating:

Please be advised that we have been served with a petition signed by a majority of our employees indicating that they no longer wish to be represented by your Union. As a consequence, we are, effective with this letter (also being sent by email to you), withdrawing recognition from your Union. We will, of course, abide by the terms of the collective-bargaining agreement consistent with the requirements of the law.

That day, Staley conducted meetings (one for first and one for second shift) with all bargaining unit employees and with supervisors present. At the meeting he read (and then posted in the plant) a letter to employees stating that

We have just been served with a petition signed by a majority of you indicating that you no longer wish to be represented by the Union. We are advising the Union of your decision but are not providing the Union with the signed petition.

CONGRATULATIONS on your decision. We support you 100% and are very happy that you have taken this action.

As you know, we still have a contract with the Union and must follow its terms until it expires on February 12, 2011. We are considering the various improvements in your pay and benefits, and other things, which we would like to take and will get back to you on those as soon as we have some final thoughts to share with you. Let's continue making high quality corn dogs and fritters and growing our business.

Again, **CONGRATULATIONS ON A VERY WISE DECISION.**

Former employee Michael Collins, who worked on the first shift, testified credibly that at the first mandatory meeting held by the employer about the petition that Staley

⁹This finding is independent of but further buttressed by my conclusion, discussed below, that this effort to have Abner sign a statement supportive of the Respondent's version of events was conducted unlawfully.

had mentioned that the union was—had just showed back up. We were getting ready for a union contract to be renewed. He said that the company was not any longer recognizing the union and that they would still honor the contract with the union until December—or February of 2011, but that they would no longer recognize the union and that the petition that had been signed had [an] overwhelming majority of people who had voted not to be represented by the union. He thanked the employees for their decision and that was pretty much the gist of the meeting, thanking everybody for voting out the [union].

Employee Travis Lusk, who worked on the second shift meeting (and attended the meeting for second shift employees) recalled Staley reading the letter to employees. Lusk credibly testified:

[Staley] then went on to say that the company was no longer recognizing the union as our bargaining agent and that the company, in essence, preferred that the plant be nonunion and congratulations on voting out the union.

Union Representative Mike Merrell learned of Monogram's withdrawal of recognition from Staley's December 2 email to him and Thompson. The next day Merrell went to the facility to speak to Staley about it. When Merrell arrived Staley was paged and came to meet him. They walked to the building with Staley's office and met there accompanied by another management official named Curry. Merrell told Staley he was surprised by his letter and Merrell asked if he could have a copy of the petition. Staley said he would not be allowed to provide a copy in order to protect the people who signed it. Staley also told Merrell that he could not provide him a copy of the petition if he wanted to because it had been sent down to the corporate offices in Memphis. Staley would not tell Merrell who presented the petition to him except to say that they were recognized as members of the Union. Staley denied having any knowledge of the petition "until they walked in here and presented it in my office yesterday." Repeatedly throughout the conversation Staley told Merrell that "we no longer recognize your union."

Union Representative Thompson followed up his earlier request for bargaining dates with an email to Greg Staley on December 10, asking for "available dates" for bargaining.

Staley responded that day, December 10, with an email stating:

Mr. Thompson, Monogram Comfort Foods, LLC has already been informed by our employees that they no longer wish to be represented by your Union. Consequently, we withdrew recognition. It would be improper for us to meet and bargain with you. We decline your request for dates and will not meet with you for that purpose.

There has been no collective bargaining between the parties since this exchange.

In a December 8, 2010 letter to employees Monogram again expressed support for the employees' petition, "congratulating" them "on a very wise decision." The letter pointed out that Monogram had to abide by the contract until it expired on February 12, 2011, promised that "[w]e will not reduce any associates pay or benefits as the result of the decertification—now or after the contract expires." The letter warned employees to "[b]e leery of promises made by the

union” and added that “[w]e are considering various improvements in your pay and benefits and other matters and will get back with you as soon as we have final thoughts to share with you.”

At a second mandatory meeting, conducted in shifts, according to Staley, “probably about a week or so” after the December 2 meeting, Staley read from “talking points” (GC Exh. 21) provided by another management official, probably—based on the commentary in the talking points—Ray Stitle, from the corporate HR department.¹⁰ A meeting was held for each shift. Stitle attended the meeting for the second shift and also spoke briefly. At this meeting, Staley said that he wanted to address rumors that the Union could fire employees, and he said this was not so, “he had the sole right to hire or fire anyone.” According to employee Travis Lusk, at this meeting Staley stated that, in terms of pay and benefits, “they weren’t going to take anything from us now. He quickly corrected himself to say they’re not going to take anything from us. He said nothing is going to change because of this decision, he said, to be nonunion.” Collins testified that at this meeting,

Greg had mentioned that it had been brought to his attention that several people were still stating that there was a union that we were being represented by and that there was no longer a union and for us not to fall for false promises that the union was making; that the company was going to take care of us; and again, that the union had been voted out.

A December 15, 2010 letter mailed (or posted) to employees from Logistics Manager Paul Whitehair stated that he had reviewed the petition and confirmed that while nonbargaining unit employees had signed the petition, their names were not counted, the signatures were authentic, and that “a majority of your peers and associates signed the petition.”

At a subsequent mandatory meeting with employees, Staley read employees a December 17, 2010 letter he had written to employees. The letter urged employees not to attend an upcoming union meeting and announced that the union meeting was not mandatory. The letter concluded by stating: “Say **NO** to the Union, **NO** to the meeting and **NO** to their false promises.” The letter was then posted on the bulletin board in the cafeteria.

6. Union employee meetings

In mid-to-late November 2010, in anticipation of upcoming negotiations for a successor agreement, the Union sent questionnaires to employees to solicit input on bargaining issues. Employees organized a meeting among themselves to go over the questionnaire. The meeting was held December 4 at a facility in town called the Ross Center just two days after Monogram’s December 2 announcement and meeting regarding the petition to remove the Union. That announcement became the focus of the meeting, and the employees decided to invite union representatives to the meeting.

The Union then scheduled its own meeting that took place December 8, at a local restaurant in a conference or party room maintained by the restaurant. There were two gatherings held this day, one for first shift at 6 p.m. and one for second shift employees at 3 p.m. Near the end of the meeting the union representatives circulated a petition prepared by

¹⁰The undated talking points (GC Exh. 21) suggest that the meeting is to be held on a Monday, which makes the most likely date of the meeting December 13, 2010, eleven days after the December 2 meeting. The talking points were very similar in message to the December 8 letter, suggesting common authorship.

Union Representative Merrell, “authorize[ing] our union, UFCW Local 700, to represent us and demand[ing Monogram Foods to immediately negotiate a new Collective Bargaining Agreement with our union.”

5 Another union meeting was conducted at the same restaurant on December 19. At this meeting the employees in attendance voted on whether to keep the Union as the bargaining representative and the tally showed that all 23 employees at the meeting voted in favor of retaining the Union as representative. The union representatives were asked to leave the room during the voting. After the voting was completed and the tally verified, the union
10 representatives were invited back into the room. After announcement of the vote results, the employees also decided to vote for new union stewards—one for each shift. Michael Collins and Travis Lusk were elected stewards.

15 The prounion petition was also circulated at this December 19 meeting. In total, at both meetings, it garnered 26 signatures from bargaining unit employees.

Merrell mailed a letter to Staley, dated January 4, 2011, reporting that the employees “reaffirmed” support for union representation at the December 19 meeting. The letter stated:

20 A meeting was held on December 19, 2010[,] during which a majority of bargaining unit members unanimously reaffirmed their support for UFCW Local 700 as their exclusive bargaining representative. In addition, Michael Collins and Jeremy Lusk were appointed and elected as shop Stewards.

25 In light of this unequivocal support, Local 700 demands that the Company immediately cease its unlawful withdrawal of recognition of the Union and allow Union Representatives access to the facility. In addition, the Company must immediately and timely process grievances through the grievance procedure. Finally, the Union demands that the Company cease harassing its employees
30 because of their support for Local 700.

I look forward to your immediate response to these issues and concerns.

35 Merrell testified that the letter was mailed to Staley as addressed. Staley testified that he did not receive the January 4 letter in the mail from the Union. He testified that he received a copy of the letter from an employee who provided it to him on January 13. Staley claimed at trial that he suspected the letter was not “authentic” and not really from the Union.¹¹

¹¹Staley testified that the copy of the January 4 letter he received had the “cc’s” added on in a different typeface, and that the paper was “skewed”—i.e., copied slightly off center. Staley testified (Tr. 551-552) that this made him concerned that the letter was not “valid” or “authentic” (Tr. 583) though he resisted, for the most part, counsel’s assiduous effort to suggest that he considered the letter “forged.” (Tr. 583-584.) Letters get photocopied less than perfectly all the time, there is nothing suspicious in that. “Cc’s” are often added by secretaries. Reasonably, the “cc’s” here did not indicate anything suspicious. There is no contemporaneous evidence for Staley’s claim at trial that he thought the Union’s letter was not authentic. The claim appears to have been developed for litigation to explain the decision to go forward with the withdrawal of recognition in the face of the Union’s claim of majority support. In any event, as discussed below, Staley’s opinion on the authenticity of the Union’s letter has no significance (other than to Staley’s credibility).

7. The Employer's refusal to recognize union stewards; further Employer meetings and communications with employees

On January 14, 2011, Staley conducted another mandatory meeting with bargaining unit employees. At this meeting he read another letter from himself to employees. The letter explained that Monogram had just received the Union's January 4, letter. Staley's January 14 letter stated that the "[t]he reason for this Notice is to clear up any misunderstanding which the Union's letter may cause" and included the following:

First, Monogram withdrew recognition because your petition, signed by a majority, asked us to do so. When we withdrew recognition, the Union legally no longer represented the associates.

Second, the Union has filed a charge with the Labor Board trying to overturn your decision. That matter is before the Labor Board and we will cooperate with the Government in its investigation. We will not turn our backs on you or your decision to get rid of the Union.

Third, we have no information about the Union's meeting or what occurred in the meeting or what the Union claims was a majority signing to get the Union back in—other than what the Union is writing in its letters. We do not believe the Union represents a majority of our associates.

Fourth, the Union says that new stewards have been elected and the Union has given us their names. We do not recognize the Union and we have no intention of dealing with the Union or its stewards as your representatives based on the Union's claims of a majority. None of you needs a "steward" to get a fair deal and to be recognized for the work you do not have to pay union dues for that recognition.

Fifth, there are no privileged characters in the plant. Everyone, including the 2 "union stewards", is expected to follow the rules and perform their jobs in the same manner as everyone else. Being a "union steward" does not entitle anyone to a special deal.

Sixth, we have, of course, continued your pay and benefits without any change and have plans for improvements in pay and benefits. We wish the Union situation would go away entirely so that we can get on with the future of this business and the business of making this an even better place to work.

Finally, the Union accused me of "harassing" our associates because of their support for the Union. The Union and you know that is untrue.

If any of you have questions about this or anything else, please do not hesitate to ask me or any other supervisor. If we do not have the answer, we will get the correct answer for you. Do not be misled by Union statements—to **get the true facts**, ask me.

(Emphasis in original.)

Monogram's assertion that it would not recognize the new stewards—as described above in the January 14, 2011 letter to employees—was also conveyed directly to new steward

Michael Collins. Collins was relieved of his line leader duties (and later discharged) in January 2011. In undisputed credited testimony, Collins testified that in a disciplinary meeting, when he asked for union representation, corporate HR director Mindy Lane, who was in the meeting via conference phone, said that Monogram “did not recognize the union any more. The company did not recognize the union as of December 2nd, that it had been decertified.” Lane told Collins “there was no way I could be the union steward because there was no longer a union.”

Finally, I note that at trial Staley testified that in the weeks after January 14, 2011, until the expiration of the contract on February 12, 2011, he made himself “available to the associates out on the floor . . . to allow them to approach me and talk to me about anything they wanted to talk to me about.” According to Staley, “numerous associates came to me and t[old] me that they did not want the Union there.” Based on these conversations, Staley made a tally of the level of support or nonsupport for the Union right before the contract concluded February 12, 2011. Based on that tally, which indicated 26 employees told him they did not want a union—more than were garnered with the December 1 petition--and based on the petition he received in December, Staley testified that he concluded that a majority of employees did not want the Union.¹²

It seems to me not coincidental that such testimony came from the same witness who, while testifying under oath, obdurately resisted admitting that the Employer withdrew recognition from the union, even in the face of numerous letters he authored (or that went out over his name) unequivocally stating that the employer was withdrawing recognition from the union.¹³ At trial, Staley appeared to regard an initial admission that recognition had been withdrawn (Tr. 27) as a mistake and proceeded to repeatedly refuse to admit that Monogram withdrew recognition from the Union (Tr. 28, 31) and then asserting that “I think that we said we didn’t decide to remove recognition, we decided to abide by the law.” (Tr. 31, 33 (“I said we didn’t decide to pull recognition, that we decided to abide by the law”)). He even denied that Monogram withdrew recognition after the labor agreement expired on February 12, 2011 (Tr. 33, 34), something admitted by the Respondent in its answer and, indeed, a central assertion of the Respondent’s case. All of this provided an eye-opening window into his credibility generally. Thereafter (and this started five minutes into his testimony), it was hard to accept the credibility of any of his testimony that was disputed by others, and, as discussed, here, some that was not.

More generally, I noticed in Staley, a penchant for the unverifiable explanation.¹⁴ Similarly, as to his late January/early February assessment of the Union’s lack of majority

¹²Staley did not produce the tally he claimed to have taken just before the end of the contract. However, at counsel’s direction, the evening before his testimony at trial, Staley took a roster of employees and marked the employees who he says approached him and told him that they did not want to have a union.

¹³See, e.g., Staley’s December 2, 2010 letter to the Union: “we are, effective with this letter . . . withdrawing recognition from your Union”; Staley’s December 10, 2010 letter to the Union: “we withdrew recognition”; Staley’s January 14, 2011 letter read to employees: “Monogram withdrew recognition because your petition, signed by a majority, asked us to do so. When we withdrew recognition, the Union legally no longer represented the associates. . . . We do not recognize the Union and we have no intention of dealing with the Union” (original emphasis).

¹⁴For example, he never received the Union’s January 4 letter in the mail; he advanced the contrived claim, discussed above, that when he saw the letter he did not believe it was written

support, there is absolutely no corroboration for Staley's claim that he, the plant manager, hung around on the floor and a majority of employees approached him and told him that they did not want union representation. No one testified that they saw it. No one testified they overheard it. Staley did not produce the contemporaneous "tally" of his discussions that he claimed to have made. It strikes me as a highly unlikely scenario. As noted, within minutes of the commencement of the hearing Staley proved willing to insist on the unbelievable in an effort to advance what he perceived to be the Employer's interest in this case. This testimony is more of the same. I do not believe it, and I discredit it.

8. The Union's request for information

On December 10, 2010, by letter and by email (sent 40 minutes before the emailed request for bargaining dates), Thompson requested from Staley a copy of an up-to-date employee seniority list including name, addresses, social security numbers, date of hire, rate of pay, and phone number for each employee.

On February 11, 2011, Thompson reiterated the December 10 request for employee seniority information in an email to Staley.

On February 24, 2011, after expiration of the labor agreement, Staley responded to the Union's December 10, 2010 (and February 11 followup) information request. Staley provided the information with a cover note to Thompson stating:

In reviewing correspondence from you, I discovered that I had not responded to your 12/10/10 request for a seniority list. I prepared the list as of 1/16/11 and am enclosing it. Please excuse my oversight.

At the hearing, Staley elaborated on his response. He testified that one reason for his delay was that the same information had been sent to Merrell in mid-October 2010. Staley added "Honestly, I forgot about it, because I had vacation coming up and we had the holidays and everything else, and I forgot about sending it." Staley claimed he did not remember it until "around" February 24, 2011, when the information was provided.

9. Observance of the contract and other dealings with the Union

In the period after December 2, 2010, until the expiration of the labor agreement, Monogram, by all evidence, continued to observe the express terms of the labor agreement. It maintained the pay and benefits for employees. It continued to deduct union dues as authorized from employee pay. It responded to grievances, and with regard to the only grievance processed through the grievance procedure—that concerning the discharge of an employee in November 2010—plans to arbitrate the dispute were underway at the time of the hearing in June 2011.

Other dealings with the Union were not so smooth. In the Monogram cafeteria there is a large corkboard bulletin board on which company announcements, mandated employment related notices, contact numbers, and other communications are posted. A portion of the bulletin board has long been devoted to union information, including scholarship information, union rights, contact numbers for union representatives and other matters the Union wanted to

by the Union; as discussed below, he testified that he inadvertently forgot to respond to the Union's December 10 information request.

post. Collins testified that one day in December near the end of his shift he saw Staley removing the union information from the bulletin board. Collins' was terminated January 27, 2011, and the union materials remained off the bulletin board through that time. Staley admitted removing the union materials, but dated this as occurring in January 2011. Staley said he
 5 removed the union materials to make room for safety team materials that he wanted to post.

Finally, three union representatives testified to their method of meeting with employees at the Monogram facility. Union Representative Jeff Thompson, who was first assigned to the Monogram unit in late August or early September 2010, visited the facility soon thereafter. He
 10 went with Union representative Mike Merrell. They first went to the office, which is in a separate building from the plant, and signed in, and the office contacted Staley to inform him of the representatives' presence. Merrell and Thompson then walked over to the plant. They sat in the picnic table area, which is Monogram property beside the building that is abutted on one side by a public walkway. Employees take breaks there to talk and to smoke. Then Thompson
 15 and Merrell went into the cafeteria break room to talk with employees. In the fall, before December 2, Thompson visited three or four additional times and, after signing in, confined his visit to the picnic table area.

After December 2, Thompson visited the facility for the first time again on December 6 at
 20 approximately 6 a.m. On the way there he received a call from Mike Merrell telling him that they were no longer allowed on Monogram property and that they could not park at the Monogram lot. They parked across the street and confined their visit to the public walkway that is adjacent to the picnic table area. When the plant is closed there is a metal fence and gate that separates the walkway from the picnic area. But when the plant is in operation the fence and gate are
 25 retracted there is no barrier or division between the walkway and the picnic area. On December 6, and in many visits since then, Thompson has stayed on the walkway and not ventured onto Monogram property because of his belief that union representatives are not allowed on the property.¹⁵

Another union representative, David Villegas, testified to following a similar procedure for
 30 visiting Monogram, which he first visited in October 2010. Villegas would park in the parking lot, sign in at the office, the office would call Staley, and then Staley would walk Villegas over to the picnic table area. Villegas never entered the Monogram facility during any of his visits. However, he believed, presumably from talking to other union representatives, that he was
 35 entitled to enter the breakroom, something he and Staley discussed during his first visit to the facility in October 2010. Villegas testified that Staley "seemed to reluctant to allow that," but Villegas did not pursue the matter. Staley testified that he told Villegas that he could stand in the picnic area and "catch the associates coming out of the building or coming in." Staley testified that he later intervened to stop an employee from calling other employees off the
 40 production line to come outside and talk with Villegas. At that time, according to Staley, he told Villegas it was a "breach of contract" to "disrupt" work and Staley claims he took the opportunity to reiterate to Villegas that he was not to go in the building. I find that Villegas was told, even if

¹⁵I credit this un rebutted testimony. After Thompson repeated his testimony that he had not ventured into the picnic table area since December 2, counsel for the Respondent asked if the witness was aware that cameras surveil the area and asked once more if Thompson was saying that he had not entered the picnic area. No evidence or claim that Thompson was seen on camera entering the picnic area was ever produced. Indeed, Staley admitted that he could not specifically identify Thompson on the camera monitors as having entered the picnic area.

indirectly, and understood, during his first visit in October, that Staley was not permitting him to enter the facility.

5 Villegas was parking his vehicle in the Monogram parking lot early the morning of December 6 when Staley pulled up beside him, asked him who he was and when Villegas told him he was a union representative, Staley told him to leave the property. Villegas complied and drove down the road where he waited for Mike Merrell and Jeff Thompson to arrive.¹⁶

10 Since December 6, Villegas' understanding (presumably based on the encounter in the parking lot) has been that the union representatives are not permitted on Monogram property. Since then, for the most part Villegas has confined himself to the public walkway by the picnic tables, but admitted walking into the picnic table area a couple of times.

15 Merrell had been the union representative for the facility for many years. He testified that in the past when he had visited the facility he would talk to employees in the picnic table area but also in the breakroom and in the parking lot. Prior to December 3 he had never been stopped from entering the facility. Merrell indicated that he visited the plant, on average, monthly. He did not always see Staley, but he would usually report to the clericals in the administrative office building.

20 When Merrell met with Stacy on December 3, regarding the withdrawal of recognition, he and Staley walked to the entrance by the picnic tables. Staley asked Merrell to wait outside while he contacted someone. Staley went inside the plant. Staley returned in about ten to fifteen minutes and said "No, I'm sorry, I can't let you in." Merrell said, "So you are denying me access to the plant?" Staley said "Well I guess so because I can't let you in." Merrell protested this. Staley told Merrell that the Union was "okay to be on the property but we were not okay to go inside the plant." Staley testified that Merrell asked if he could go into the plant to post materials on the bulletin board. Staley said "no, you have to stay right here." Staley then left.

30 Merrell later heard from Villegas that, at the direction of Staley, the Union was not to park in the parking lot. After that Merrell avoided entering Monogram's property, including, for the most part, the picnic area. He stayed on the sidewalk by the parking area because he knew that would not be a problem. A few times during this period he did come onto the picnic area.

35 Staley testified that cameras that are trained on the plant grounds can be viewed from a monitor in his office. He testified that since December he thought he observed union representatives in the picnic area eight to ten times, but is positive he saw a union official there once. Staley could not identify Villegas, Merrell, or Thompson, as having entered the picnic table area. When he saw someone he believed to be affiliated with the Union in the picnic table area he did not take any action.

Analysis

45 The government alleges that Monogram unlawfully withdrew recognition from the Union on or about December 2, 2010, in violation of Section 8(a)(1) and (5) of the Act. The

¹⁶Staley testified that he saw cars with motors running in the parking lot and, because "we are not in the best neighborhood of town," he went over to the parking lot and approached one of the cars and told the driver they could not park there. Staley claimed that only when the cars pulled away did he see union stickers and surmised that the cars were with the Union.

government further alleges that, pursuant to the withdrawal of recognition, and also in violation of Section 8(a)(1) and (5) of the Act, Monogram thereafter unlawfully limited union officials' access to facility property, and to the bulletin board, refused to recognize the union stewards, and unlawfully delayed providing the Union with requested relevant information.

The government also alleges an array of unlawful conduct by Monogram's supervisors and managers in violation of Section 8(a)(1) of the Act. This unlawful conduct relates to supervisory involvement in the petition to remove the Union, and, after withdrawal of recognition, to letters and statements of Monogram officials, pronouncements about the withdrawal of recognition, soliciting employees to cease paying dues, and promising increased wages and benefits because of the removal of the Union. Finally, at trial, counsel for the General Counsel alleged that in interviewing an employee in connection with preparing to defend the unfair labor practice charges filed against it in this case, the Respondent unlawfully ignored the safeguards required by the Board in *Johnnie's Poultry, Inc.*, 146 NLRB 770 (1964).

I will consider each alleged violation, beginning first with the various independent section 8(a)(1) violations and then turning to the 8(a)(5) allegations. Finally, I will consider the *Johnnie's Poultry* allegation raised by counsel at trial.

I. The Alleged Section 8(a)(1) violations (complaint paragraph 5)

Section 7 of the Act grants employees, among other rights, "the right to self-organization, to form, join, or assist labor organizations." 29 U.S.C. § 157. Pursuant to Section 8(a)(1) of the Act, it is "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1).

A. Anthony Morgan (complaint paragraph 5(a))

The government alleges that Supervisor Anthony Morgan, on or about December 12, 2010, instructed employees to sign a petition withdrawing their support for the Union.

The only evidence implicating Morgan in the petition effort is that offered by Miguel Vazquez. As discussed above, I am not convinced of its accuracy, and I have not credited it. Accordingly, this allegation of the complaint will be dismissed.¹⁷

B. Tina Greene (complaint paragraph 5(b))

The government alleges that in November 2010 Supervisor Tina Greene solicited employees to withdraw support from the Union, interrogated employees about their union activities, and promised employees there would be improvements in benefits if the Union was removed as the bargaining representative.

These allegations are well founded based on the credited evidence. As I have found, Supervisor Greene solicited employee Craig to sign the petition to remove the Union, calling her into the office and then following her out again urging her to sign the petition. Craig described it as "harassment to get me to sign it." In the service of soliciting Craig, Greene told her that the

¹⁷The complaint also alleges in paragraph 5(a)(i) that Morgan informed employees that the Respondent was going to get rid of the Union. On brief (G.C. Br. at 27 fn. 32) counsel for the General Counsel moved to withdraw that allegation on grounds that the evidence offered at trial does not support it. The motion is granted.

Employer offered better insurance than the Union. Greene interrogated employee Toler as to whether he was “for the union or against the union.” She then solicited him to sign the petition to remove the Union, a copy of which was in the printer attached to the computer in her office. She reiterated her solicitation of Toler a couple of days later, this time adding “that by being company, not union, that our pay would be better” and employees would receive “two extra days, holidays off on the calendar.” Finally, the credited evidence is that Greene solicited her sister, employee Kathy Abner, to sign the petition to remove the Union.¹⁸

It is settled precedent that an employer violates Section 8(a)(1) of the Act by “actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative.” *Wire Products Mfg. Corp.*, 326 NLRB 625, 640 (1998), enfd. mem. 210 F.3d 375 (7th Cir. 2000). This includes promising similar or more favorable benefits in the event the employees initiate and sign such petitions. *Central Washington Hospital*, 279 NLRB 60, 64–65 (1986), enfd. 815 F.2d 1493 (9th Cir. 1987); *Fabric Warehouse*, 294 NLRB 189, 191 (1989) (“Express promises of better benefits linked to getting rid of the Union clearly tend to undercut support for the Union. Accordingly, we find that these statements violated Section 8(a)(1) of the Act”), enfd. mem. 902 F.2d 28 (4th Cir. 1990). An employer also violates Section 8(a)(1) by interrogating an employee about their union sympathies in the context, as here, where “[i]ts purpose was to induce and convince the employees to sign the petition.” *Hercules Automotive, Inc.*, 285 NLRB 944, 949 (1987); *Hearst Corp.*, 281 NLRB 764 (1986), enfd. mem. 837 F.3d 1088 (5th Cir. 1988).

I find that the Respondent, through Greene, violated Section 8(a)(1) of the Act by soliciting employees to withdraw support from the Union, coercively interrogating employees about their union sympathies, and promising improvements in benefits if the Union was removed as the bargaining representative.

C. Respondent's communications to employees (complaint paragraphs 5(c)—(f))

The government alleges that through the communications to employees by Staley and other Monogram officials, the Respondent violated Section 8(a)(1) of the Act by telling employees that it no longer recognized the Union and that the employees were no longer represented by the Union, by promising improved wages and benefits because the employees withdrew support from the Union, and by soliciting employees to stop paying union dues.

In paragraph 5(c), the government alleges that on or about early December 2010 Staley told employees that the Respondent no longer recognized the Union as the employees' collective-bargaining representative. The credited testimony of former employee Collins was that at the first mandatory meeting conducted by Staley, Staley told the assembled employees that “the company was not any longer recognizing union and that they would still honor the contract with the union until . . . February 2011, but that they would no longer recognize the union.” Employee Travis Lusk's credited testimony was that at the first mandatory meeting Stacy told the employees that “the company was no longer recognizing the union as our bargaining agent and that the company, in essence, preferred that the plant be nonunion and congratulations on voting out the union.” Similar declarations were made to employees at the second mandatory meeting, telling them “there was no longer a union.”

¹⁸This last incident may have occurred in November as alleged or, more likely, it occurred on December 2. I note that a discrepancy in dates, without more, is insufficient to find that a respondent has been prejudiced. *Parts Depot, Inc.*, 332 NLRB 733, 734 fn. 6 (2000).

This credited testimony proves the violation alleged in paragraph 5(c). *Spectrum Health*, 353 NLRB 996, 1005 (2009) (two-member decision) ("to tell employees that there was no union when, in fact, there was, undermined the Union's representative role' and, therefore, constituted an independent violation of Section 8(a)(1)"), adopted 355 NLRB No. 101 (2010), citing *Windsor Convalescent Ctr.*, 351 NLRB 975, 987-88 (2007), enfd. in relevant part 570 F.3d 354 (D.C. Cir. 2009).

However, contrary to complaint allegation 5(d)(i), the December 8, 2010 letter from Staley, Stitle and Johnson does not announce to employees that they are no longer represented by the Union. I will dismiss complaint allegation 5(d)(i).

The letter does, however, implicitly promise improvements in pay and benefits as a consequence of the employees indicating they no longer want be represented by the Union. In the context of offering their "support" for the employees signing the petition, and expressing how "pleased" they were by the employees' action, the letter's authors Stitle/Staley/Johnson stated that "[w]e will not reduce any associates pay or benefits as the result of the decertification—now or after the contract expires," and stated that "[w]e are considering various improvements in your pay and benefits and other matters and will get back with you as soon as we have final thoughts to share with you." The commitment not to cut pay or benefits (even after the contract expires) and the suggestion of "various improvements in your pay and benefits" to come are offered in the context of the authors' express pleasure with and support of the employees' decision to disavow the Union. There is little doubt, and I find, that these promises are, albeit implicitly, a consequence of the employees' putative disavowal of the Union.

Thus, as to paragraph 5(d)(ii), which alleges that the letter contained a promise of improvement in pay and benefits, the allegation is proven.

Contrary to complaint paragraph 5(e), the December 15, 2010 letter from Whitehair does not announce to employees that they were no longer represented by the Union and does not promise employees improved wages and benefits because they withdrew support for the Union. The letter makes no such representations. I will dismiss complaint paragraph 5(e)(i) and (ii).

Complaint paragraph 5(f)(i) alleges that Staley's January 14, 2011 letter announced to employees that they were no longer represented by the Union. The complaint alleges in paragraph 5(f)(ii) that the letter promised employees improved wages and benefits because they withdrew their support from the Union, and in paragraph 5(f)(iii) that it solicited employees to cease paying union dues.

Each of these complaint allegations is accurate. First, the January 14, 2011 letter explicitly stated that "Monogram withdrew recognition because your petition signed by a majority, asked us to do so. When we withdrew recognition, the Union legally no longer represented the associates." Later in the letter, it states: "We do not recognize the Union and we have no intention of dealing with the Union or its stewards as your representatives." (Emphasis in original.) This is a violation of Section 8(a)(1). *Spectrum Health*, supra, *Windsor Convalescent Center*, supra.

Second, the January 14, 2011 letter states that "we have, of course, continued your pay and benefits without any change and have plans for improvements in pay and benefits. We wish the Union situation would go away entirely so that we can get on with the future of this business and the business of making this an even better place to work." Particularly in the context of the whole letter, its hostility to union representation and vow to help the employees

remove the Union, the “plans for future pay and benefits” and the wish that the union issues (i.e., the Union) “would go away entirely” so that “we can make this an even better place to work” are thinly veiled—if they may be said to be veiled at all—statements that the plans for better pay and benefits are the result of and, indeed, conditioned upon, the removal of the Union from the workplace. This constitutes an independent violation of the Act.

Finally, in explaining that the Employer will not recognize the Union and will not deal with its stewards, the letter asserts that “[n]one of you needs a ‘steward’ to get a fair deal and to be recognized for the work you do **and you do not have to pay union dues for that recognition.**” (Emphasis in original.) These exhortations constitute solicitation to employees to revoke their dues check-off authorizations, which is unlawful for the Employer to actively encourage. *Rock-Tenn Co.*, 238 NLRB 403, 403–404 (1978); *Roslyn Gardens Tenants Corp.*, 294 NLRB 506, 516 (1989).

II. Alleged Section 8(a)(5) violations (complaint paragraphs 7 and 8)

A. The withdrawal of recognition (complaint paragraphs 7(a and b))

1. Summary

Section 8(a)(5) requires an employer to bargain with the union that represents a majority of its employees. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). An employer who withdraws recognition from an incumbent union will be found to have violated Section 8(a)(5). *Id.*¹⁹

The precondition for a union’s service as a bargaining unit’s exclusive representative is the existence of majority support for the union within the unit. *Auciello Iron Works*, *supra* at 785–786. This reflects “the Act’s clear mandate to give effect to employees’ free choice of bargaining representatives. *Levitz*, 333 NLRB at 720. However,

[t]he Board has also recognized that, for employees’ choices to be meaningful, collective-bargaining relationships must be given a chance to bear fruit and so must not be subjected to constant challenges. Therefore, from the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective-bargaining relationships, as well as employee free choice, by presuming that an incumbent union retains its majority status.

Levitz, *supra* at 720.

The presumption of majority support is usually rebuttable, but in some periods of a collective-bargaining relationship it is conclusive. One such period is during the life of a collective-bargaining agreement that is not longer than three years duration. Thus, it is a “long-established principle that a union enjoys an irrebuttable presumption of majority support during the term of a collective-bargaining agreement, up to 3 years.” *Trailmobile Trailer, LLC*, 343 NLRB 95, 97–98 (2004); *Levitz*, *supra* at fn. 17 (“a union’s majority status may not be questioned during the life of a collective bargaining agreement up to 3 years”); *Auciello Iron*

¹⁹In addition, an employer’s violation of Sec. 8(a)(5) of the Act is a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679, *enfd.* 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

Works, 517 U.S. at 791 (rejecting an exception “to the conclusive presumption [of majority support] arising at the moment a collective-bargaining contract offer has been accepted”).

During a period when the presumption of majority support is rebuttable—i.e., when no labor agreement is in effect or beyond the first three years of a long term agreement— an
 5 "employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit." *Levitz Furniture Co.*, 333 NLRB at 725. However, as the Board in *Levitz* explained:

10 [A]n employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove
 15 by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).

20 Of course, “an employer may only withdraw recognition if the expression of employee desire to decertify represents “the free and uncoerced act of the employees concerned.”” *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985) (quoting *KONO-TV-Mission Telecasting*, 163 NLRB 1005, 1006 (1967)).

25 An employer confronted with evidence that a union has lost majority support during the term of the agreement may announce an “anticipatory withdrawal,” pursuant to which it refuses to negotiate a successor agreement and announces that it will not recognize the union after the contract expires. As the Board explained in *Parkwood Developmental Center*, 347 NLRB 974, 975 fn. 10 (2006), *enfd.* 521 F.3d 404 (2008):

30 Under the "anticipatory withdrawal" cases, an employer faced with evidence that an incumbent union has lost majority support during the term of a collective-bargaining agreement may lawfully refuse to negotiate a successor agreement and announce that it will not recognize the union after the contract expires,
 35 provided that it complies with the existing contract in the interim. However, an employer's "withdrawal of recognition [is] as to—and only as to—negotiating a successor contract to the existing agreement." *Abbey Medical*, 264 NLRB [969,] 969 [(1982)]. Such an employer may not completely withdraw recognition until the contract expires because until then the union enjoys an irrebuttable presumption of majority status. See *Levitz*, 333 NLRB at 730 fn. 70.

40 In this case, Monogram was party to a three-year collective-bargaining agreement (that it assumed midterm) that expired February 12, 2011. Accordingly, the Union enjoyed an irrebuttable presumption of majority support on December 2, 2010. As of that date, in terms of unilateral action to withdraw recognition, Monogram was limited to the following: it could rely on
 45 legitimate objective evidence of the Union's loss of majority support to “lawfully refuse to negotiate a successor agreement and announce that it [would] not recognize the union after the contract expire[d], provided that it complie[d] with the existing contract in the interim.” The withdrawal of recognition must be “as to—and only as to—negotiating a successor contract to the existing agreement.” *Parkwood*, *supra*. It could act on its evidence of the Union's loss of
 50 support and withdraw recognition from the Union after expiration of the labor agreement on

February 12, 2011, and only if it could prove there was a loss of majority support on the date (after February 12) that recognition is subsequently withdrawn. *Levitz, supra*.

As discussed at length herein, the evidence shows that Monogram failed this test at almost every point in the analysis.

First, the petition to remove the Union did not establish a loss of majority support—it was tainted by supervisory involvement and unfair labor practices.

Second, even assuming, wrongly, that the petition proved a lack of majority support on December 2, the irrebuttable presumption of majority support enjoyed by the Union on that date, precluded Monogram from withdrawing recognition from the Union on December 2 or anytime before expiration of the contract on February 12, 2011—but that is what it did during that time frame. It is true that Monogram announced an intent to abide by the contract—part of its continuing duty under a theory of anticipatory withdrawal—but its statements and conduct evinced withdrawal of recognition *other* than a willingness to abide by contract. More is required: in an anticipatory withdrawal situation, beyond a refusal to negotiate a successor labor agreement, recognition cannot in any other manner be withdrawn during the period in which the irrebuttable presumption of majority support is in effect.

Alternatively, even if the fiction is indulged—that the Respondent’s repeated assertions of withdrawal of recognition were only (unlawful) assertions, and that by its conduct it did not withdraw recognition until after the contract’s expiration—then its assertions of withdrawal (and other conduct) still constitute unfair labor practices that interfered with employees’ Section 7 rights, and precluded it from relying on a lack of majority support in February 2011 to withdraw recognition.

Finally, even assuming, very wrongly, that on December 2, Monogram lawfully announced an anticipatory withdrawal based on lawful objective evidence of the lack of the Union’s majority support, the Employer cannot prove that the Union did not have majority support as of the expiration of the contract, when it claimed, in its answer, that it withdrew recognition. The Union’s petition in favor of continued union representation, gathered on December 8 and 19, 2011, and the composition of the bargaining unit on February 12, 2011, undercut any effort to prove a lack of majority support based on the petition from December 1.

2. The petition to remove the Union

As discussed, above, the credited evidence reveals that in November 2010, after employee Holly Craig refused to sign the petition to remove the Union, Supervisor Greene called Craig into her office “and tried to talk [Craig] into just signing the petition.” In doing so she suggested that Monogram’s insurance was better than that offered under the agreement with the Union. She persisted in her efforts, following Craig out of the office until Craig agreed to sign the petition, which she characterized as “harassment.” Further, about a week before the December 2 withdrawal of recognition announcement, Greene interrogated employee Toler about his union sympathies and solicited him to sign the petition, calling him into her office, and handing him a copy of the petition from the printer in her office. A couple of days later Greene renewed her solicitations to Toler, this time promising better pay and more holidays for employees if the Union was removed. Finally, the credited evidence reveals that Greene solicited her sister, employee Kathy Abner, to sign the petition, twice calling her into the office to urge her to sign the petition to remove the Union. As found, all of this conduct violated the Act.

Under on point Board precedent, Greene's unlawful efforts in support of the petition invalidate the petition as a basis to prove the Union's loss of majority support. As the Board recently explained, in *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16, slip op. at 1 (2011), and applying the Board's holding in *Hearst Corp.*, 281 NLRB 764 (1986), enfd. mem. 837 F.3d 1088 (5th Cir. 1988), "an employer may not withdraw recognition based on a petition that it unlawfully assisted, supported, or otherwise unlawfully encouraged, even absent specific proof of the misconduct's effect on employee choice." In other words, in cases where the employer's unfair labor practices are part of the decertification effort, the Board "presumes that the employer's unlawful meddling tainted any resulting expression of employee dissatisfaction, without specific proof of causation, and precludes the employer from relying on that expressed disaffection to overcome the union's continue presumption of majority support." *SFO Good-Nite Inn*, supra, slip op. at 2.

Notably, under this analysis, it is irrelevant whether the employees unlawfully solicited by the employer to sign the decertification petition ended up signing the petition or whether the other employees were aware of the employer's unfair labor practices directed towards the decertification effort. *SFO Good-Nite Inn*, slip op. at 3 (rejecting argument that petition signed by 14 of 24 employees could be relied on to show lack of majority support for the union because unlawfully pressured employees did not sign the petition and no evidence that any signers knew of the Respondent's coercive acts).

Without more, the Respondent's withdrawal of recognition—anticipatory or otherwise—which was squarely based on the petition to remove the Union, was unlawful.

3. The Employer unlawfully withdrew recognition as of December 2, 2010

Even assuming, wrongly, that the petition proved a lack of majority support on December 2, the irrebuttable presumption of majority support enjoyed by the Union on December 2, precluded Monogram from withdrawing recognition from the Union at that time or anytime prior to the expiration of the contract on February 12, 2011.

Monogram does not dispute this principle. Rather, it contends that its actions should not be construed as withdrawing recognition, but rather, construed as an announcement that it was going to withdraw recognition after the labor agreement expired. According to the Respondent:

Monogram's unequivocal verbal and written statements that it would follow the terms of the contract until its expiration, despite the language about withdrawing recognition, were the legal equivalences of continuing recognition and placing Local 700 on notice that it did not intend to negotiate a replacement agreement.

R. Br. at 32 (emphasis in original)).

Respondent's argument is, obviously in my view, an afterthought—an effort to put the best face on a clear failure to follow the Board precedent on "anticipatory withdrawal." As a matter of English it did not announce an anticipatory withdrawal to employees or the Union. It unequivocally withdrew recognition, and it repeated this to employees and the Union throughout December 2010 and January 2011.

Staley's initial December 2 letter to the Union "advised" that Monogram received a petition signed by a majority of employees indicating that they no longer wished to be

represented by the Union. "As a consequence," wrote Staley, "we are, effective with this letter (also being sent by email to you), withdrawing recognition from your Union."

It is hard to imagine a clearer indication of immediate withdrawal of recognition. This theme was repeated relentlessly in the following weeks and months:

December 2, 2010, first shift meeting with employees (Staley told employees Monogram "would no longer recognize the union").

December 2, 2010, second shift meeting with employees (Staley said "the company was no longer recognizing the union as our bargaining agent").

December 3, 2010 meeting with Merrell (Staley repeatedly told Merrell "we no longer recognize your union").

Staley's December 10, 2010 written response to Union Representative Thompson's request for available dates for bargaining ("Monogram Comfort Foods, LLC has already been informed by our employees that they no longer wish to be represented by your Union. Consequently, we withdrew recognition. It would be improper for us to meet and bargain with you").

On or about December 13, 2010, at the second mandatory employee meeting (Staley "mentioned that it had been brought to his attention that several people were still stating that there was a union that we were being represented by and that there was no longer a union and for us not to fall for false promises that the union was making; that the company was going to take care of us; and again, that the union had been voted out").

January 14, 2011 letter posted and read verbatim to employees ("Monogram withdrew recognition because your petition, signed by a majority, asked us to do so. When we withdrew recognition, the Union legally no longer represented the associates. . . . [T]he Union says that new stewards have been elected and the Union has given us their names. We do not recognize the Union and we have no intention of dealing with the Union or its stewards as your representatives based on the Union's claims of a majority" (original emphasis)).

It is also relevant to the issue of withdrawal of recognition that in either December or January Staley cleared the Union's materials from the breakroom bulletin board. And it is also relevant that during employee Collins' discipline meeting, on January 9, 2011, Collins declared that he was the new union steward and "as the new union steward" requested to be represented by a union representative at the meeting. HR Director Lane, participating in the meeting by conference phone, told Collins that "[t]he company did not recognize the union as of December 2nd, that it had been decertified" and Lane told Collins "there was no way [he] could be the union steward because there was no longer a union."

The issue is not whether Collins was entitled to representation at the meeting. The issue is that the Employer made clear that it was not recognizing him, or anyone, as a union steward "because there was no longer a union." (Emphasis added.)

This is a withdrawal of recognition.

What the Employer did not do was terminate the labor agreement. From the outset of its withdrawal of recognition it professed an intention to abide by the contract until its termination. And by all evidence the employer continued to abide by the agreement, including the processing of grievances arising during the life of the contract.

But this does not show that it engaged in a lawful anticipatory withdrawal. In a legitimate case of anticipatory withdrawal, an employer is not required *just* to maintain the labor agreement in effect. It is forbidden to otherwise withdraw recognition. *Parkwood Developmental Center*, 347 NLRB at 975. Under the Board's anticipatory withdrawal doctrine "an employer's withdrawal of recognition [is] as to—and only as to—negotiating a successor contract to the existing agreement. Such an employer may not completely withdraw recognition until the contract expires because until then the union enjoys an irrebuttable presumption of majority status." *Parkwood*, supra, 975 at fn. 10 (citing *Abbey Medical*, 264 NLRB 969 (1982), enfd. mem. 709 F.2d 1514 (9th Cir. 1983)), and *Levitz*, supra (citations and internal quotations omitted)) (Board's bracketing).

Thus, in order to effectuate an anticipatory withdrawal an employer cannot announce that it is "effective with this letter . . . withdrawing recognition from your Union." It cannot announce to union representatives that, "we no longer recognize your union," and it cannot announce to employees that it refuses to recognize the union stewards and that "we have no intention of dealing with the Union or its stewards" and that the "new union stewards . . . were not recognized because as of December 2, the union has been decertified."

However, this is precisely what Monogram did. These pronouncements are inconsistent with a lawful anticipatory withdrawal. Even assuming, arguendo, this a legitimate anticipatory withdrawal situation, Monogram's obligation was to deal with Union, was to recognize and deal with its stewards, until such time as it could lawfully withdraw recognition.²⁰

Alternatively, if one stretches the truth and indulges the fiction that, despite its repeated statements, Monogram, in fact, engaged in "the legal equivalences of continuing recognition," its statements of withdrawal of recognition and refusal to work with the Union or its stewards still constitute textbook violations of Section 8(a)(1) of the Act. *Spectrum Health*, supra, *Windsor Convalescent Center*, supra ("to tell employees that there was no union when, in fact, there was, undermined the Union's representative role" and, therefore, constituted an independent violation of Section 8(a)(1)). These violations were repeated over and over by Monogram

²⁰It is true, of course, that the Respondent's conduct was not entirely consistent with a total withdrawal of recognition. On December 3, when Staley met with Union Representative Merrell and confirmed that Monogram was withdrawing recognition, Staley also told Merrell that while he could not enter the facility (as he had in the past) that he could talk with employees in the picnic table area on Monogram property. But this concession to the collective-bargaining representative—itself a limitation on past practice—does not overcome the evidence that Respondent made clear to anyone that was listening that recognition had been withdrawn. I note also that from December 10, 2010 to February 24, 2011, the Respondent failed to respond to the Union's request for information. As discussed below, Staley attributed this to "forgetting." He also attributed it to the fact that the Union had requested and received the same information two months before. The fact is the silence in response to the Union's request is consistent with the withdrawal of recognition and in marked contrast to the alacrity with which it responded to the Union's October request for information. Later, after the contract expired in February, after the Region's investigation was underway, Staley sent the information and apologized for the "oversight."

between December and February 2011. In addition, as found, above, during this period the Employer unlawfully promised wage and benefit increases and unlawfully solicited employees to cancel their dues-checkoff authorizations. Such unlawful misconduct during the period of time when the Union's presumption of majority support was irrebuttable queers any effort to question the Union's majority support in February. The Respondent's duty under *Levitz* was to "prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition"—i.e., in February 2011. However, it can only do so "in a context free of unfair labor practices." *Abby Medical*, 264 NLRB 969, 969 (1982), *enfd. w/o op.* 709 F.2d 1514 (9th Cir. 1983); *Levitz*, 333 NLRB at 717 fn. 1 ("We adhere to the Board's well-established policy that employers may not withdraw recognition in a context of serious unremedied unfair labor practices tending to cause employees to become disaffected from the union").

The unfair labor practices engaged in by the Respondent strike at the heart of the Union's representational role and its status in the eyes of the employees during the very period of time when the Union is entitled to rely on the irrebuttable presumption of majority support to win back majority support in fact. To deem lawful a withdrawal of recognition at the contract's expiration under such circumstances would eviscerate the value of the irrebuttable presumption of majority support as well as the purpose of an anticipatory withdrawal of recognition.

*4. The Employer has not proven that as of February 12, 2011
the Union lacked majority support*

Assuming, wrongly, that Monogram lawfully engaged in an anticipatory withdrawal of recognition on December 2, 2010, based on a valid petition from employees, and without committing subsequent unfair labor practices, it would still not be able to withdraw recognition from the Union at the termination of the contract.

An employer withdrawing recognition must "prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5)." *Levitz*, *supra*. "The union does not have to demonstrate conclusively to the employer prior to the withdrawal of recognition that it still has majority status. Rather, it is the employer's burden to show an actual loss of the union's majority support at the time of the withdrawal of recognition." *HQM of Bayside, LLC*, 348 NLRB 787, 788 (2006), *enfd.* 518 F.3d 256 (4th Cir. 2008).

An employer moving to withdraw recognition based on a petition from employees does so "at its peril." *Levitz*, 333 NLRB at 725. If the withdrawal of recognition is later challenged through an unfair labor practice proceeding, it is the employer's burden to prove "that the union had, in fact, lost majority support at the time the employer withdrew recognition." *Id.*

Even putting to the side the unfair labor practices engaged in by Monogram, it has failed to demonstrate the Union's actual loss of majority support at the expiration of the agreement, the time which it claims it could have and did withdraw recognition from the Union.

Monogram and the General Counsel agree that the petition to remove the Union includes the signatures of 24 of the 46 bargaining unit employees employed as of December 1, 2010.²¹ However, at trial the General Counsel produced the petition circulated by the Union at

²¹The General Counsel points out that one additional employee, Vance, was discharged with

its December 8 and 19 meetings, which authorizes continued union representation and calls for immediate negotiations for a new labor agreement. This union petition included the signatures of seven employees (Rose Hardin, Shamyia Wills, Danny Johnson, Chris Sloan, Susana Bonilla, Tony Figuaroa, and Miguel Vazquez) who previously signed the disaffection petition.

5

The evidence was undisputed that these were valid authentic signatures and the testimony about the process through which they were solicited was credible, unobjectionable, and undisputed. Under settled precedent, the Employer cannot rely on those seven signatures in its effort to demonstrate the Union's lack of majority support in February 2011. *HQM of Bayside*, 348 NLRB at 787-788; *Parkwood Developmental Center*, 347 NLRB at 974-975.

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This reduces the number of employees objectively expressing opposition to union representation to 17, which is less than a majority.

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Moreover, the credited and undisputed evidence is that the day after signing the petition Holly Craig told Plant Manager Staley that she wanted her name removed from the petition. Staley told her it was too late, but it certainly undercuts the Employer's reliance on her signature as evidence that she does not support union representation. In any event, she left employment with Monogram February 10, 2011, two days before the expiration of the contract, so her signature cannot be counted in assessing the Union's support as of the contract's February 12, 2011 expiration. That brings the number to 16.

20

As the General Counsel points out, the February 12, 2011 payroll register introduced into evidence shows that the bargaining unit had been reduced to 41, and that the reduction included the loss of three unit employees who had signed the disaffection petition (Alex Estes, Andrew Hall, and Chris Walker). The loss of those three unit employees brings the number of unit employees as of February 12 who could be counted as not supporting the Union to 13. Craig's February 10 resignation brought the total unit complement to 40 as of the contract's expiration.

30

Thus, by the contract's expiration Monogram possessed objective evidence of disaffection from 13 of 40 bargaining unit employees. This is obviously inadequate to rebut the Union's presumption of majority support or on which to base a withdrawal of recognition.

35

On brief, the Respondent focuses considerable effort on challenging the validity of the Union's petition and its significance. Monogram's arguments miss the mark.

40

Monogram objects that the Union did not show it the "prounion" petition in January 2011, but only notified the Monogram in the January 4, 2011 letter that the Union was contending it had majority support. Putting aside that the Respondent also refused to show the Union the disaffection petition, the significance of the Union's failure to produce the petition at that time is zero. Similarly, there is no cause to dwell on Staley's contrived claim (see discussion, *supra*) that he doubted the authenticity of the union letter claiming majority support. The very point of *Levitz* was to render Staley, and the Respondent's, *perceptions* about the Union's majority status an irrelevancy. The Respondent took the risk that it subsequently would be proven

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his grievance pending, and argues that he should be included as a member of the bargaining unit. I need not resolve that question. I will assume, without deciding, that he is excluded from the count.

wrong when it ignored the Union's claim of majority support and proceeded to withdraw recognition. As the Board in *Levitz*, supra at 725, took care to "emphasize,"

an employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).

Thus, the issue is not what the Respondent thought or believed—even in good faith—about the Union's majority support when it withdrew recognition. The issue is not what the Union did or did not do to help the Respondent determine the Union's status.

The issue is whether the Respondent can prove at the hearing that at the time of the unilateral withdrawal the incumbent Union did not have majority support. It is not the Union's burden to prove majority support in order to stop an employer from resorting to a unilateral withdrawal of recognition. *HQM of Bayside, LLC*, 348 NLRB at 788. "The union does not have to demonstrate conclusively to the employer prior to the withdrawal of recognition that it still has majority status. Rather, it is the employer's burden to show an actual loss of the union's majority support at the time of the withdrawal of recognition." *Id.*

This is precisely what the Respondent has failed to prove, one of many reasons being that the Union's petition was shown at trial to be a valid and properly procured document that contained seven signatures that cancel out the ability of the Respondent to count those employees in its effort at trial to prove the lack of majority support. At trial, in part of because of the Union's petition, Monogram was not able to prove that the Union lacked majority support at the time that it claims it withdrew recognition after February 12, 2011.

The Respondent contends that the Union's petition should not be relied upon because it is undated on its face. There is no basis for that claim. The question is whether the Union's petition has been shown at trial to be an accurate and unobjectionably procured piece of evidence that undercuts and rebuts the Respondent's effort to prove that the Union did not have majority support when the Respondent withdrew recognition. In this case, union representatives and employees testified credibly about how and when the petition came into being. And though undated, there was not the slightest evidence to suggest that the petition was fraudulent, or signed and created at a time other than the witnesses explained: at Union meetings in December 2010, conducted in response to the announcement by Monogram that it had received an employee petition on which it was relying to withdraw recognition. Accordingly, the Union's petition is appropriate evidence that controverts the Respondent's effort to prove the Union's lack of majority status.

Finally, the Respondent also presses, on brief, its contention that Staley developed his own evidence that the Union lacked majority support by making himself "available" in the plant in January and February, and allowing employees to approach and tell him they did not want a union. As noted, above, I have rejected these claims by Staley as untrue and not worthy of belief. I rejected his claims because they are uncorroborated—not a single other witness testified to seeing or being part of this—because the contemporaneous tally Staley claimed to have made documenting these conversations was discarded—he recreated it the night before

his testimony—and because Staley repeatedly demonstrated himself to be a witness capable of saying and sticking to any point that he believed would advance the Employer’s position, no matter how unlikely.

5 I note that the Respondent takes much time in its brief arguing that oral evidence received from employees is “objective” for purposes of *Levitz*. I am in full agreement with that. The issue is the quality and force of the evidence. And in this case, for the reasons stated, Staley’s claims about his encounters with employees are not credible.

10 ***B. Refusal to bargain a successor agreement
(complaint paragraph 7(j))***

15 It is undisputed that the Respondent rebuffed the Union’s December 1 and 10, 2010 requests to arrange dates to meet to bargain a successor labor agreement for the agreement expiring February 12, 2011. In response to the Union’s requests, Monogram told the Union that it “withdrew recognition” and that it “would be improper for us to meet and bargain with you. We decline your request for dates and will not meet with you for that purpose.”

20 Having rejected the validity of the Respondent’s withdrawal of recognition, and its anticipatory withdrawal defense, its refusal to meet to bargain a successor agreement must also be rejected. The Respondent violated Section 8(a)(1) and (5) by its refusal to meet to bargain a successor agreement.

25 ***C. Limiting Union access to the facility, bulletin board, and property
(complaint paragraphs 7 (c) and (d))***

30 The government alleges that Monogram violated Section 8(a)(1) and (5) of the Act by, after the December 2, 2010 withdrawal of recognition, on or about December 3, limiting union officials’ access to the facility, denying union officials’ access to the bulletin board located in the Respondent’s facility, and by, as of December 6, 2010, denying union officials access to the Respondent’s property.

35 The evidence marshaled in support of these allegations involves the refusal to permit Merrell into the facility to put information on the bulletin board on or about December 3, the demand that the Union representatives not park in the parking lot early the morning of December 6, and the Union’s understanding that, henceforth, they were not allowed on the property to talk to employees, including the employee picnic table area that abuts the public walkway.

40 In mounting this claim, the government makes two related but separate legal claims. It claims (complaint paragraph 7(f), (g), and paragraph 10) that these developments amounted to an unlawful unilateral change in terms and conditions of employment, made without notice to the Union or providing the Union with an opportunity to bargain. It also alleges (complaint paragraph 7(h), (i) and paragraph 11) that this conduct amounted to a violation of Monogram’s obligations under Section 8(d) of the Act, in that this conduct amounts to a failure to continue in effect all terms and conditions of the labor agreement without the Union’s consent to change or abrogate terms and conditions of the contract.

50 This latter claim—the violation of Section 8(a)(5) premised on a failure to maintain the contract—must be dismissed. The only references in the labor agreement to union agents’ access to the facility is one (section 21) that permits up to two union representatives “after

obtaining permission from the Employer to enter the plant to discuss grievances” and a second provision (section 6) that restricts “the Union” from “solicit[ing] employees during working hours or on Company property in order to persuade them to join the Union or continue their Union membership.” There is no other reference in the labor agreement to union officials’ right to have access to the facility, the bulletin board, or the property. There is no evidence that such a practice was negotiated and incorporated into the labor agreement through a clause relating to the parties’ practices. None of the incidents complained of by the Union involved barring a union representative from entering the plant to discuss grievances and, to my mind, there is no evidence or reason to believe they would have been excluded from the plant to discuss grievances. Indeed, although the record does not speak directly to whether union representatives were allowed or attempted to enter the facility to discuss grievances, the evidence is clear that the Employer maintained the grievance process throughout the remaining months that the labor agreement was in force. Accordingly, there is no violation of Section 8(a)(5) that is premised on the obligation, pursuant to Section 8(d), to continue in effect the terms of the labor agreement.

Somewhat different is a unilateral change of an ongoing practice that is unreferenced in the collective-bargaining agreement. Generally, an employer violates Section 8(a)(5) of the Act if it makes a material unilateral change during the course of a collective-bargaining relationship on matters that are a mandatory subject of bargaining. “Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.” *NLRB v. Katz*, 369 U.S. 736, 747 (1962).²²

Below, I consider each of the government’s unilateral change allegations.

1. Access to the Facility. Merrell had been the union representative for the facility for many years. He testified that in the past when he had visited the facility he would talk to employees in the picnic table area but also in the break room and in the parking lot. Prior to December 3 he had never been stopped from entering the facility. Merrell indicated that he visited the plant, on average, monthly and had a long history of being permitted to enter. He did not always see Staley, but he would usually report to the clericals in the administrative office building.

Of course, it is undisputed that on December 3, Staley barred Merrell from entering the facility to post information on the bulletin board. Staley told Merrell he could be in the picnic table area, which is Monogram property, but that he could not enter the building. Villegas had a similar, or at least, a consistent experience when he visited the facility for the first time in October 2010. Staley made it clear to him that he could not enter the building. Villegas—probably from talking to Merrell—believed he had a right to enter the facility, although he did not attempt to on that occasion. Nevertheless, Staley made it clear to him that he could not, and that he should stay in the picnic table area.

On brief, the Respondent does not deny that there was a unilateral change to its policy of permitting union representatives to enter the facility. To the contrary, it admits it, asserting (R. Br. at 17) that “the “access” procedures were changed and that Villegas, and thus the Union, were put on notice of the change on that (unspecified) day in October when he was instructed by Staley that he was not to go into the facility. There is no question but that the

²²Contractual waiver is a defense to a unilateral change, but it is not one advanced by the Respondent in this case.

Union was neither informed in advance nor provided an opportunity to bargain over this change. Union access to a facility is a mandatory subject of bargaining. *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992), enfd. 71 F.3d 1434, 1438 (9th Cir. 1995); *Ernst Home Centers, Inc.*, 308 NLRB 848, 848-849 (1992). It would appear to be a straightforward violation of the Act.

The Respondent's entire defense to this allegation (R. Br. at 17-19) is, to paraphrase it, "yes, Merrell was denied access on December 3, but that was due to a unilateral change implemented in October, not on December 3 as alleged in the complaint."

Under the circumstances, this is not grounds for dismissal of the allegation. The Board's *Pergament* doctrine provides that the Board may find an unalleged violation "if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.*, 296 NLRB 333 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). That is the case here. This October incident is closely connected to the subject matter of the complaint. Indeed, the October incident, which, by the Respondent's account was undertaken without advance notice or explanation to the Union, was the first manifestation of the same change in access procedures to which Merrell was subjected in December. And the denial of access in October is an issue that has been "fully litigated." The "determination of whether a matter has been fully litigated rests in part on whether . . . the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." *Pergament*, supra at 335. That rule "has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses." *Id.* In this case, the Respondent is advancing the admission on which the finding relies.

Here, the Respondent admits the change occurred, unilaterally, and without notice to the Union, but one to two months prior to the time specified in the complaint. A violation of the Act is proven and found to have been occurring since October 2010.

2. Not allowing the Union to post on bulletin board. As described above, Merrell was denied access to the facility on December 3. His purpose for entering at that time was to post material on the bulletin board. But there is no evidence that he was denied access specifically because he wanted to post on the bulletin board. Had he wanted to visit the breakroom or do anything else within the facility, he would have been denied access. The unilateral change at issue here is the one described above in the preceding section. The allegation is duplicative and not a separate violation. I dismiss it on these grounds.

3. Access to the Property. Apart from access to the facility, the practice was for the Union to speak with employees at the picnic table area, which is outside the facility on Monogram property. The picnic area is accessible from a public walkway. On December 3, 2010, when Staley prohibited Merrell from entering the building, he told him he could stay in the picnic table area. Staley told Villegas the same thing in October.

On December 6, Villegas was told to leave the parking lot by Staley. Based on this incident, the union representatives concluded that they were being barred from all Monogram property, including the picnic table area. Henceforth, for the most part, the union representatives avoided entering the picnic table area and confined themselves to the public walkway abutting the picnic table area. However, there is no evidence that Staley or any other Monogram representative told the union representatives they could not be in the picnic table area. As Merrell noted, such a directive would have been at odds not only with past practice, but with Staley's direction to him December 3. Moreover, there is no evidence that the

Respondent took any affirmative steps after December 3 to bar or remove any union representative from the picnic table area (the few times they ventured onto the property).

The question then, is whether the undeniably unwarranted act of telling the union representative, on one occasion, to leave the parking lot constitutes a change in practice regarding access to the Employer's property. I do not believe it does. It is, perhaps understandable, in the context of repeated assertions by the Employer to employees and the Union that it had withdrawn recognition, that the Union believed its representatives were not permitted in the picnic table area. But the withdrawal of recognition is a separate violation. In terms of access to property, the only variance from normal practice by the Employer was the one time demand that the union representatives leave the parking lot. This is inadequate to constitute a unilateral change in practice. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1354 (2006); *Flambeau Airmold Corp.*, 334 NLRB 165, 177 (2001). I will dismiss this allegation of the complaint.

D. Refusal to recognize union stewards (complaint paragraph 7(e))

The government alleges that Monogram violated Section 8(a)(1) and (5) of the Act by refusing to recognize the union stewards as of January 14, 2011. As with the allegations relating to union access to the property, in mounting this claim the government offers two related but separate legal claims. It claims (complaint paragraph 7(f), (g), and paragraph 10) that the failure to recognize the stewards amounted to an unlawful unilateral change in terms and conditions of employment, made without notice to the Union or providing the Union with an opportunity to bargain. It also alleges (complaint paragraph 7(h), (i) and paragraph 11) that this conduct amounted to a violation of its bargaining obligations under Section 8(d) of the Act, in that the failure to recognize the stewards amounted to a failure to continue in effect all terms and conditions of the labor agreement without the Union's consent to change or abrogate terms and conditions of the contract.

The labor agreement speaks specifically about the right of "[t]he Union steward" to "attend the [grievance] meeting in all steps." However, there is no evidence that a steward attempted to attend a grievance meeting. While the Employer's unequivocal declarations to Collins and to employees generally that it was not recognizing the stewards certainly lead one to question whether this provision of the contract was operable, the evidence is uncertain as to this narrow contractual right.

At the same time, there is no question but that any practice of recognizing the Union's stewards was swept away—subsumed—by the Employer's withdrawal of recognition. As a matter of logic and a matter of Monogram's representations, the general withdrawal of recognition precluded recognition of the union's stewards. As Staley explained to the employees on January 14, 2011: "We do not recognize the Union and we have no intention of dealing with the Union or its stewards as your representatives based on the Union's claims of a majority." (original emphasis). As HR Director Lane told employee (and union steward) Collins: "[T]here was no way [he] could be the union steward because there was no longer a union."

The difficulty I have with the General Counsel's argument is the claim that the refusal to recognize the stewards constitutes a separate violation, independent and distinct from the general withdrawal of recognition from the Union. It is true that the Respondent refused to deal with the new union stewards, but it did so because and as part of its refusal to recognize or deal with the Union outside of its express contractually mandated obligations. I will dismiss it on those grounds.

**E. Delay in providing requested information
(complaint paragraphs 8(a)-(c))**

The government alleges that Monogram violated Section 8(a)(1) and (5) of the Act by delaying the furnishing of information requested by the Union. The Union requested information about bargaining unit employees and their pay and service dates on December 1, 2010, and reiterated the request on February 11, 2011. The information was provided February 24, 2011, with a note from Staley saying that the delay was an “oversight.”

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of its employees.” 29 U.S.C. § 158(a)(5). As explained in *A-1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 2 (2011):

An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956) [parallel citations omitted]. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005).

Like a flat refusal to bargain, “[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act.” *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), *enfd.* 603 F.2d 1310 (8th Cir. 1979).

“An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all.” *Monmouth Care Center*, 354 NLRB No. 2 (2009) (citations omitted), *reaffirmed and incorporated by reference*, 356 NLRB No. 29 (2010). “[I]t is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow.” *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). “In evaluating the promptness of the employer's response, ‘the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.’” *West Penn Power Co.*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995)), *enfd.* in relevant part 394 F.3d 233 (4th Cir. 2005).

In this case, it is clear that the Respondent did not respond as promptly as possible. The information in question—basic information on the bargaining unit employees—was readily available and could have been provided in days, as it was in October 2010. The fact that the information had been requested in October provides no grounds for delay. There is nothing remarkable about the Union requesting this type of simple information after two months to make sure it had accurate and up-to-date information on the bargaining unit.

Similarly, Staley’s explanation that he “forgot” about the request does not excuse the delay. Staley did not say that he did not respond because Monogram was no longer recognizing the Union, but given Monogram’s other actions and pronouncements in December 2010, it has that appearance, corrected only on February 24, 2011, with the receipt of the information and an accompanying note apologizing for an inadvertent delay.

In any event, the failure to provide information, or a delay in doing so, is a per se violation. The test is not scienter. The test whether there was an effort “to respond to the request as promptly as circumstances allow.” *Good Life Beverage*, supra. Here, taking Staley at his word, the circumstances advanced by Staley are his vacation, the holidays, and “everything else,” which caused him to “forg[e]t about sending” the information. This explanation does not demonstrate an effort “to respond to the request as promptly as circumstances allow.” Rather, it suggests a lack of care to the task at hand. Especially given that the oversight occurred in the context of multiple unfair labor practices and a general refusal to recognize the union, it is no wonder that the Respondent overlooked this obligation. But “forg[et]ting” is not a defense. *Bethea Baptist Home*, 310 NLRB 156, 191 (1993).

The Respondent violated the Act by delaying the furnishing of the information requested December 10, 2010, until February 24, 2011.

III. Allegation of unlawful interrogation of Kathy Abner (oral amendment at trial)

At trial counsel for the General Counsel moved to amend the complaint to allege a failure by the Respondent to adhere to the safeguards required by the Board for interrogating an employee as part of an employer’s preparation for unfair labor practice litigation. See *Johnnie’s Poultry Co.*, 146 NLRB 770 (1964).²³

In *Johnnie’s Poultry*, the Board held that “[d]espite the inherent danger of coercion,” an interrogation of employees, for the purpose of investigating facts raised in a complaint or in preparation a defense for trial is permitted, without a finding of Section 8(a)(1) liability. However, an employer enjoys this privilege only so long as it follows “established specific safeguards designed to minimize the coercive impact of such employer interrogation”:

Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee’s subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege.

²³On brief, the Respondent contends that the motion to amend was never granted and that it would be “manifestly unjust” to grant it post trial. I do not agree with either contention. In response to the motion, I stated: “I’m inclined to allow the amendment. I’ll reserve ruling on the merits.” I believe this served to grant the motion. At an irreducible minimum, it made it crystal clear that a ruling on the merits of the claim was reserved and would be forthcoming. And, of course, at the hearing, and in its brief, the Respondent knew to and did argue the merits of the violation. Indeed, at trial the Respondent *did not oppose the amendment*, it voiced opposition only to the merits of the *Johnnie’s Poultry* claim. (Tr. 463.) There is no prejudice to the Respondent in having to defend the merits of this claim. To the extent the granting of the amendment was unclear, I grant it now.

Johnnie's Poultry, 146 NLRB at 775 (footnotes omitted).

The *Johnnie's Poultry* safeguards apply to interviews with respect to unfair labor practice charges. *Le Bus*, 324 NLRB 588 (1997). With the exception of extraordinary circumstances, the Board strictly follows these rules. *WXGI, Inc.*, 330 NLRB 695, 712 (2000), enfd. 243 F.3d 833 (4th Cir. 2001).

The impetus for the General Counsel's amendment was Supervisor Peter Chan's admission that when employee Kathy Abner was called into Supervisor Greene's office and presented with a statement for signature, prepared by the Employer and endorsing Greene's version of events with regard to her involvement with the petition to remove the Union, Abner initially was not told that it was voluntary for her to be there and not informed that no action would be taken against her if she chose not to participate in the meeting. According to Chan, after Abner was provided the statement and reviewed it, she "seemed hesitant to sign it because she was worried she was going to get in trouble or something like that, . . . we reassured her that that wasn't the case and I mean she signed it afterwards." It is also the case that on cross-examination Abner agreed that before the conversation began she had been assured that she could answer questions without fear of reprisal (and without promise of reward).

The analysis of this is complicated somewhat by the suggestion in Chan's testimony—affirmatively endorsed by the Respondent on brief (R. Br. at 29)—that there was a prior interview with Abner to discuss her statement. It makes sense that there would have been and, indeed, Chan specifically referenced the prior discussion in his testimony although he denied doing so when I asked him about it. Regrettably, there is no record evidence about what happened at this first interview, assuming it occurred. Abner was not asked about it. Greene was not asked about it. Chan was not pressed on his reference to it.

Where does that leave us? The Respondent argues that the prior meeting is the one where the safeguards should have been provided and there is no evidence they weren't. According to the Respondent, the introductory statement to Abner's statement—which recites that she had been "advised that I could answer questions without fear of reprisal or promise of reward"—shows that in the first interview she must have been provided with the safeguards. Respondent argues that the meeting described by Abner, Chan, and Greene was just the "simple act of witnessing Abner sign a document" (R. Br. at 29) and there was no need to provide any new safeguards.

It would have been easier if there had been testimony about what happened at this previous interview, assuming it did occur. But in the absence of that luxury, analysis of the *Johnnie's Poultry* violation comes down to an assessment of the burdens of the parties in this context.

In *Le Bus*, 324 NLRB 588 (1997), the administrative law judge dismissed an 8(a)(1) allegation when the respondent failed to provide the *Johnnie's Poultry* assurances before an interview. The judge found that the employee had been provided the assurances on previous occasions and, therefore, the failure to give the assurances before the later meeting constituted special circumstances that excused the employer's obligation to meet the *Johnnie's Poultry* requirements before the final interview. 324 NLRB at 588.²⁴

²⁴In finding special circumstances obviating the need for the *Johnnie's Poultry* safeguards, the judge in *Le Bus* also relied upon the fact that the employee was perceived as an ally of the

The Board reversed the judge's failure to find a violation in reasoning applicable here:

Although the Board has generally required strict application of the *Johnnie's Poultry* safeguards, the Board has also found that unusual settings and special circumstances may excuse or mitigate an employer's failure to give the required assurances.

We find, contrary to the judge, that no such special circumstances are present in the instant case. Here, Reiter failed to give any assurances to Meadows when questioning him about his knowledge of a statement by the Respondent's operations manager that employee Janice Redmond would be discharged for possessing a union letter. Although the record shows that Meadows received such assurances in prior interviews, the Respondent has not shown that those earlier interviews were close in time to, and encompassed the same subject matter as, the instant questioning of Meadows. Thus, the Respondent has not met its burden of showing that special circumstances exist which would warrant excusing the Respondent from its obligations under *Johnnie's Poultry*. Accordingly, we find that by questioning employee Meadows in preparation for this hearing and failing to give Meadows the requisite assurances the Respondent violated Section 8(a)(1) of the Act.

324 NLRB at 588 (footnotes omitted).

Thus, the Board places the burden on the respondent to show that safeguards offered in prior meetings were adequate to constitute special circumstances that warrant excusing the obligation to provide the *Johnnie's Poultry* safeguards at the later meeting. In this case, the Respondent cannot shoulder that burden because we do not know—assuming, as I do, that there was a prior interview—what was said at the meeting. We do not know if the safeguards were given, or in what manner. And even if we assume as the Respondent would have us do, that the recitation in Abner's written statement was provided to her at the initial interview, this still is insufficient, as there is no evidence that Abner was told that her participation in the process was voluntary. This is particularly significant given that Abner was summoned to Greene's office (an "inherently coercive setting" (*Pratt Towers, Inc.*, 339 NLRB 157, 172 (2003))).

Moreover, the questioning did not "occur in a context free from employer hostility to union organization" as required in order to rely on the *Johnnie's Poultry* privilege. *Johnnie's Poultry*, 146 NLRB at 775. As found herein, the context of the questioning was the employer's unlawful withdrawal of recognition based on an employee petition tainted by supervisory involvement, the denial of which was the precise object of the interrogation. Indeed, as in the *Johnnie's Poultry* case, the interview was "but part and parcel of [the respondent's] efforts to avoid recognizing and bargaining with a statutory representative." The Board holds that "[i]n circumstances such as these we do not believe that Respondent may rely upon privilege to justify an unwarranted intrusion into the protected activity of employees." *Id.* Given this, the *Johnny Poultry* safeguards were not complied with and the questioning of Abner about her interactions with Supervisor Greene and the petition was coercive.²⁵

employer in opposing the union, a factor not present here.

²⁵I note that the Respondent does not advance the argument that the subject matter of the statement it sought from Abner—her interactions with Greene about the antiunion drive—was an innocuous interrogation that did not require the safeguards set out in *Johnnie's Poultry*.

Notably, while the Board holds that compliance with all *Johnnie's Poultry* safeguards is a minimum requirement to avoid liability, the Board recognizes that some courts, including the United States Courts of Appeals for the Seventh Circuit, in which this case arose, do not apply a "per se" rule in *Johnnie's Poultry* cases, but rather examine the totality of the circumstances in determining whether the interview is coercive. *Wisconsin Porcelain, Co.*, 349 NLRB 151, 153 fn. 11 (2007). Given the fact that the interview took place with two supervisors, in a supervisor's office, to which Abner was summoned but then not informed that the enterprise was voluntary, and particularly, given that the entire process occurred in the context of and was inextricably related to the unlawful withdrawal of union recognition by the employer, I would find the interview unlawful under a totality-of-circumstances standard.

CONCLUSIONS OF LAW

1. Respondent Monogram Comfort Foods, LLC (Respondent) is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Charging Party United Food and Commercial Workers International Union, Local 700 (Union) is a labor organization with the meaning of Section 2(5) of the Act.
3. At all material times, the Union has been the designated exclusive collective-bargaining representative of the bargaining unit of employees identified in section 2 of the collective-bargaining agreement, effective from February 16, 2008 until February 12, 2011, and assumed by the Respondent when it assumed the Muncie, Indiana operations in approximately May 2009.
4. Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition of the Union as the collective-bargaining representative of the bargaining unit employees, as of December 2, 2010, and thereafter failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees.
5. Respondent violated Section 8(a)(1) and (5) of the Act by implementing unilateral changes in terms and conditions of employment, without notifying the Union or providing an opportunity to bargain, including, as of October 2010, limiting Union officials' access to the facility.
6. Respondent violated Section 8(a)(1) and (5) of the act by, delaying the furnishing of relevant information requested by the Union on December 10, 2010, until February 24, 2011.
7. Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing since December 10, 2010, to meet and bargain with the Union for the purpose of negotiating a successor collective-bargaining agreement.
8. Respondent violated Section 8(a)(1) of the Act by, among other acts, soliciting employees to withdraw support from the Union, promising employees improved benefits if the Union was removed as the employees' collective-bargaining representative, coercively interrogating employees about their union sympathies, announcing to employees that the Respondent no

longer recognized the Union as the employees' collective-bargaining representative, announcing to employees that they were no longer represented by the Union, promising employees improved wages and benefits because they withdrew their support for the Union, and soliciting employees to cease paying union dues, on various dates between November 2010 and January 2011.

9. Respondent violated Section 8(a)(1) by coercively interrogating an employee on March 16, 2011, for the purpose of preparing a defense to unfair labor practice charges in violation of the rights of the employee guaranteed by Section 7 of the Act.

10. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall recognize the Union as the collective-bargaining representative of the bargaining unit of employees described above, and upon request, bargain for a reasonable period of time (as set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001)) with the Union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit and embody any understanding reached in a signed agreement.²⁶

²⁶In remedying the Respondent's refusal to bargain with an affirmative bargaining order, I am imposing "the standard Board remedy for more than 50 years when an employer has refused to bargain with an incumbent Section 9(a) union." *Caterair International*, 322 NLRB 64, 66 (1996). However, in *Caterair*, the Board recognized that the U.S. Court of Appeals for the District of Columbia Circuit requires that an affirmative bargaining order be justified by a reasoned analysis that includes the balancing of three considerations applied to the particular facts of the case: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act. Applying the test set out by the D.C. Circuit, I find that the balancing of these three factors warrants an affirmative bargaining order in this particular case.

An affirmative bargaining order vindicates the Section 7 rights of the Monogram unit employees who were denied the benefits of collective bargaining by the Respondent's unlawful withdrawal of recognition and refusal to collectively bargain with the Union. Of course, there are employees who may oppose continued union representation, but their Section 7 rights are not unduly prejudiced by the affirmative bargaining order because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. Since the Union was never given an opportunity to attempt to reach a successor agreement with the Respondent, it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that all employees will be able to fairly assess for themselves the Union's effectiveness as a bargaining representative. The bargaining order affords employees a fair opportunity to assess the Union's performance in an atmosphere free of the Respondent's unlawful conduct.

An affirmative bargaining order also serves other policies of the Act by fostering meaningful collective bargaining and industrial peace. It removes the Respondent's incentive to

Respondent shall, upon the Union's request, rescind the unilateral change in terms and conditions of employment it made in limiting union officials' access to the facility and restore the practices in effect for union officials to have access to the facility that were in existence prior to October 2010. The Respondent shall notify the Union and, on request, bargain with the Union before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees.

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2010. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 25 of the Board what action it will take with respect to this decision.²⁷

delay bargaining in the hope of discouraging support for the Union, and ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

A cease-and-desist order, alone, would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain with the Union because it would allow another such challenge to the Union's majority status before the taint of the Respondent's previous unlawful withdrawal of recognition dissipated. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be particularly unfair in light of the fact that the litigation of the Union's charges took several months and, as a result, the Union needs to reestablish its representative status with unit employees. Indeed, permitting a decertification petition to be filed immediately might very well allow the Respondent to profit from its own unlawful conduct. I find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation. For all the foregoing reasons, I find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case.

²⁷I decline the General Counsel's request (G.C. Br. at 38) that the remedy in this case include an order that a management official read aloud the posted notice to employees on working time or have an agent of the Board read it to employees in the presence of a management official. This remedy is imposed by the Board in cases where traditional remedies are inadequate to remedy the violations committed by the Respondent (often where a bargaining order is inappropriate). That has not been demonstrated here. To be sure, the Respondent here committed serious unfair labor practices. I do not want to minimize the misconduct. The Union was denied its right to recognition, employees who wanted union representation were denied their right to it, and employees were subjected to an aggressive and unlawful display of contempt for the Union by this Employer. However, the unlawful conduct

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁸

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ORDER

10 The Respondent Monogram Comfort Foods, LLC, Muncie, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

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a. Failing and refusing to recognize and bargain with the United Food and Commercial Workers International Union, Local 700 (Union) as the exclusive collective-bargaining representative of the bargaining unit of employees set forth in the collective-bargaining agreement assumed by the Respondent and that expired February 12, 2011.

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b. Failing and refusing to bargain with the Union by unilaterally implementing changes in terms and conditions of employment without notifying the Union and without providing an opportunity to bargain.

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c. Delaying the furnishing to the Union of relevant information requested by the Union.

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d. Failing and refusing to bargain with the Union by refusing to meet for the purpose of negotiating a successor collective-bargaining agreement.

e. Soliciting employees to withdraw support from the Union.

f. Promising employees improved benefits if the Union is removed as the employees' collective-bargaining representative.

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g. Coercively interrogating employees about their union sympathies.

chiefly involved a withdrawal of recognition based on an overzealous (and independently unlawful) effort to cajole and encourage employees to reject the Union. The pressure brought to bear against employees by the use of these tactics is not benign. But the Board sees much worse: discriminatory discharges of employees, trumped up discipline against union activists, and pointed threats of retaliation against employees for exercising their section 7 rights or failing to abide by the employer's demands. Here, there are no findings (or allegations) of any of that kind of harsh, retaliatory misconduct. Given that, and given that as part of the remedy the Union's status as bargaining representative will be restored, I do not believe the General Counsel's "special" remedy is warranted.

²⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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- h. Announcing to employees that the Respondent no longer recognizes the Union as the employees' collective-bargaining representative.
 - i. Announcing to employees that they are no longer represented by the Union.
 - j. Promising employees improved wages and benefits because they withdrew support from the Union.
 - k. Soliciting employees to cease paying dues to the Union.
 - l. Coercively interrogating employees for the purpose of preparing a defense to unfair labor practice charges in violation of their rights guaranteed by section 7 of the Act.
 - m. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:
- a. Recognize the Union as the exclusive collective-bargaining representative of the bargaining unit of employees described above and, upon the Union's request, bargain for a reasonable period of time with the Union for a collective-bargaining agreement to cover the unit employees and embody any understanding reached in a signed agreement.
 - b. Upon the Union's request, rescind any unilateral changes in terms and conditions of employment implemented without notifying the Union in advance and providing an opportunity to bargain, including as of October 2010, limiting union officials' access to the facility, and continue those terms and conditions of employment unless and until they are changed through collective bargaining.
 - c. Within 14 days after service by the Region, post at its Muncie, Indiana facility the attached notice marked "Appendix."²⁹ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of

²⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2010.

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- d. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

10 IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 31, 2011

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David I. Goldman
U.S. Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize the Union and WE WILL NOT refuse to bargain a successor collective-bargaining agreement with the Union to replace the agreement that expired on February 12, 2011.

WE WILL NOT unilaterally implement changes in terms and conditions of employment without first notifying the Union and without providing the Union an opportunity to bargain.

WE WILL NOT delay furnishing to the Union relevant information requested by the Union.

WE WILL NOT solicit employees to withdraw support from the Union.

WE WILL NOT coercively interrogate employees about their union sympathies.

WE WILL NOT promise employees improved benefits if the Union is removed as the employees' collective-bargaining representative.

WE WILL NOT announce to employees that we no longer recognize the Union as the employees' collective-bargaining representative.

WE WILL NOT announce to employees that they are no longer represented by the Union.

WE WILL NOT promise employees improved wages and benefits because they withdrew support from the Union.

WE WILL NOT solicit employees to cease paying dues to the Union.

WE WILL NOT coercively interrogating employees for the purpose of preparing a defense to unfair labor practice charges in violation of their rights guaranteed by federal labor law.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL recognize the Union as the exclusive collective-bargaining representative of the employees and WE WILL, upon the Union's request, bargain with the Union for a new collective-bargaining agreement, and embody any understanding reached in a signed agreement.

WE WILL, upon the Union's request rescind any unilateral changes in terms and condition of employment we implemented without notifying the Union in advance and providing an opportunity to bargain, including as of October 2010, limiting Union officials' access to the facility, and WE WILL continue those terms and conditions of employment unless and until they are changed through collective bargaining.

MONOGRAM COMFORT FOODS, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577

(317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 226-7413.